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No. 82-3133
DC No. C78-439M
Western Washington (Seattle)

In the Supreme Court of the United States

October Term, 1983

JOHN DEAN, Petitioner

v.

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether DEAN's First and Fifth Amendment rights were violated by having to pay union dues for purposes he manifestly objected to when no duty to account or adjust charges was being enforced against the union.

2. Whether the United States Court of Appeals for the Ninth Circuit erred by reversing the District Court's order granting partial summary judgment because the Court failed to consider material facts and failed to recognize controlling cases.

In the Supreme Court of the United States

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No. 82-3133

JOHN DEAN, Petitioner

u

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, JOHN DEAN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit and the Order of the District Court for the Western District of Washington granting partial summary judgment appear in the Appendix herein.

JURISDICTION

The District Court for the Western District of Washington entered its Order granting partial summary judgment on September 8, 1981, time unknown. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 16, 1983, time unknown. An Order denying petitioner's motion for rehearing and suggestion for rehearing en banc was entered on August 25, 1983, time unknown and this Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

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STATEMENT OF THE CASE

This is a wrongful discharge case arising under the Federal Railway Labor Act. The District Court granted the wrongfully discharged plaintiff's motion for partial summary judgment or liability and gave a partial remedy by ordering the employee, JOHN L. DEAN (DEAN), immediately reinstated. The defendant union, AIR LINES PILOT ASSOCIATION INTERNATIONAL (ALPA), and the defendant employer, TRANS WORLD AIRLINES (TWA), filed an interlocutory appeal. The United States Court of Appeals for the Ninth Circuit reversed the District Court's grant of summary judgment.

JOHN L. DEAN, plaintiff below and appellee herein, began his employment with TRANS WORLD AIRLINES (TWA), co-defendant below and appellant herein, in February of 1966 as a pilot with the title of First Office (co-pilot). DEAN continued as a valued employee of TWA for more than eleven years. He was discharged in August of 1977 for his alleged delinquency in agency-shop service charges payable to the Air Lines Pilots Association International (ALPA), co-defendant below and co-respondent herein.

DEAN became a member of ALPA in 1966 when he was hired by TWA. In 1972 DEAN decided to resign from ALPA. Citing irreconcilable differences, DEAN elected to "sever all relations with ALPA" and informed ALPA by letter dated September 20, 1972. ALPA slowed the processing of DEAN's resignation while it conducted an investigation. (Stip. Exh. #3.) Foreshadowing future events, DEAN and the union exchanged correspondence, each attempting to persuade the other to reconsider. On February 20, 1973, ALPA approved DEAN's resignation effective September 20, 1972.

In 1975, ALPA and TWA negotiated an agency-shop agreement (hereinafter the agreement) which was incorporated into the ALPA/TWA collective bargaining agreement as Section 3-B. In effect, the agreement allowed ALPA to require, as a condition of continued employment, that non-union regularly assigned pilots pay a "service charge as a contribution for the administration of the Agreement and representation of such pilot." (Stip. Exh. 10.) The agreement outlines procedures to

follow should a non-member pilot become delinquent in the payment of his service charge.

On November 10, 1975, ALPA advised all TWA pilots by letter of the agency-shop agreement. A letter conveying the same information was sent by ALPA on December 19, 1975 to all non-union TWA pilots. (Stip. Exh. 11 & 12.) These letters and the initial service charge billing DEAN with an amount equal to union dues touched off a flurry of correspondence between DEAN and ALPA. Fundamentally, DEAN raised objections to ALPA's use of his service charge for purposes not related to the collective bargaining process.

DEAN first challenged the use of his service charges for purposes unrelated to collective bargaining by letter to ALPA dated March 15, 1976. In that letter, DEAN specifically pointed to the authority of *International Association of Machinists* u *Street, 367 U.S. 740, add to Brotherhood of Railway and Steamship Clerks* u *Allen*, 373 U.S. 113. DEAN requested an accounting and reduction of service charges under the authority of the cited cases. (Stip. Exh. 15.) See Judge McGovern's Findings of Fact and Conclusions of Law, page 2.)

On March 31, 1976, ALPA informed DEAN by letter that "[W]e have discussed the Supreme Court cases mentioned in your letter with legal counsel and are advised that those decisions do not require any alteration in your service charge . . ." (Stip. Exh. 16.) ALPA refused to make any adjustment in DEAN's service charges, even though it did expend funds for purposes wholly unrelated to collective bargaining, including political purposes. (Judge McGovern's Findings of Fact and Conclusions of law, Page 2.) DEAN continued his written demands for an accounting and service charge reduction. In response, ALPA continued to refuse to adjust DEAN's service charge.

In early 1977, DEAN moved his residence from Kansas City, Missouri to Olympia, Washington. Both TWA and ALPA were advised of this change of address. DEAN's December and January ALPA service charge billings were not received on time. DEAN made a payment adjusted to accord with his own best estimates of his service charge obligation. He began sending ALPA ten dollars ($10.00) per month. This practice

continued throughout 1977; with each payment, DEAN repeated his demands that ALPA make an accounting required by *Street* and *Allen* and adjust his service charge accordingly. In reply to DEAN's letter of April 15, 1977, ALPA reiterated its above mentioned position in an undated letter posted on May 5, 1977. (Stip. Exh. 78.)

By registered letter dated June 29, 1977, ALPA mailed to DEAN a 15-day termination notification as required by Section 3-B of the agreement. (Stip. Exh. 82.) This notification was never received by DEAN. The return receipt was signed by Glenn C. Davis, manager of Capitol Lakes Towers where DEAN lived. Mr. Davis and his wife had been specifically instructed by DEAN not to sign for his mail.

DEAN was subsequently terminated by TWA at ALPA's request on August 11, 1977 without any prior notification of the impending termination.

REASONS FOR GRANTING THE WRIT

I

On June 16, 1983, the United States Court of Appeals for the Ninth Circuit reversed a decision rendered by the United States District Court for the Western District of Washington wherein the Honorable Judge Walter T. McGovern granted petitioner DEAN's motion for a partial summary judgment. The Court of Appeals reversed the decision on the grounds that petitioner DEAN did not pursue a proper avenue for redress, characterizing DEAN's good-faith adjustment of his agency-shop obligation as a "self-help injunction." It is important to recognize, as did the Court of Appeals, that JOHN DEAN did not stop making agency-shop payments to ALPA entirely, but merely reduced the amount of agency-shop obligation from an amount equal to full union dues to an amount reflective of his own best estimate of the proportionate share of the costs incurred in the collective bargaining process he is required to pay under the terms of the TWA/ALPA collective bargaining agreement, Section 3-B.

The Court of Appeals errs in its reversal of the District

Court's judgment by failing to consider material facts and controlling cases presented; specifically, the Court of Appeals failed to recognize that JOHN DEAN is obligated to pay only his proportionate share of collective bargaining costs under the terms of the agency-shop agreement and failed to consider its own decisions in *Seay v. McDonnell-Douglas Corp.*, 427 F.2d 996. (9th Cir. 1970.)

It is essential that the Supreme Court recognize that the agreement entered into between TWA and ALPA is not a union-shop agreement, but, rather, an agency-shop agreement. Apparently, the Ninth Circuit did not recognize this fact as evidenced by its referral to DEAN's agency-shop obligation as union dues.

> "If courts cannot enjoin the collection of union dues, then certainly an individual should not be permitted unilaterally to decide to reduce or stop *dues* payment (emphasis added).

Dean v. ALPA and TWA, _____ F. 2d _____, (Ninth Cir. 1983).

> "The differences between membership dues and representation fees are more than a matter of dollars alone. Representation fees are payments for services rendered; membership dues support an institution. The Supreme Court has frequently noted the distinction between a union's "institutional costs" and its expenditures for collective bargaining purposes."

International Union, Etc., v. National Labor Relations Board, 675 F.2d (D.C. Circ.) 1257, 1259 (1982).

Many of the Circuit Courts of Appeal fail to recognize this distinction, creating conflicting authority amongst the Circuits to such a degree that this Court should address the issue.

DEAN, as a non-union member, is bound only by the terms of the collective contract; that is, DEAN is obligated only to pay "a service charge as a contribution for the administration of the agreement and the representation of such pilot." (Stip. Exh. 10.)

At all material times, JOHN DEAN made payments to ALPA for his proportionate share of costs incurred in collective bargaining and administration. In fact, DEAN continued

to fulfill his obligation to ALPA after ALPA breached its duty of fair and equitable representation of DEAN by its outright refusal to account for expenditures not germane to collective bargaining as mandated by *International Association of Machinists v. Street, Id.*

The Court of Appeals cites the following passage from *Street, Id:*

> The [employees] who have participated in this action have in the course of it made known to their respective unions their objection to the use of their money for the support of political causes. However, the union-shop agreement itself is not unlawful. [Citation omitted.] *The [protesting employees] therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement.*

JOHN DEAN fulfilled any obligation he owed ALPA by his continuous payment of all agency-shop obligations. Only after ALPA wrongfully refused to account to DEAN for expenditures not germane to the collective bargaining agreement, and only after ALPA failed to notify DEAN of his correct obligation, did DEAN, in good faith, reduce his payment to reflect his own best estimates of the proper agency-shop obligation.

The Court of Appeals continues its opinion by citing the following passage from *Allen, supra:*

> lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered.*

Court of Appeals Opinion, pg. 3.

Yet, the Court of Appeals failed to consider any of the special circumstances present in the case at bar.

John Dean began requesting an accounting for expenditures not germane to the collective bargaining agreement with the inception of the TWA/ALPA agency-shop agreement in 1975. In his letters to ALPA, Dean cited the authority of both *Street* and *Allen*. ALPA refused Dean's requests,

however, and informed Dean that ALPA maintained no duty to account. (Stip. Exh. 16.) ALPA persisted in this wrongful refusal for a period of nearly six years, at which time it was forced to disclose political expenditures in pre-trial discovery.

ALPA breached the duty to represent John Dean fairly and equitably when it deceitfully refused to grant Dean's request that it account for its political expenditures and allow Dean to pay his proportionate share of the costs of collective bargaining as authorized by the TWA/ALPA agreement.

The Court of Appeals for the Ninth Circuit recognizes the duty owed to non-union employees by the collective bargaining agent in *Seay v. McDonnell-Douglas*, 427 F.2d 996 (9th Cir. 1972). In *Seay*, the Ninth Circuit was presented with a similar agency-shop agreement.

"It is a duty to represent all of the employees — both members of the union and non-members — in utmost good faith and fairness." Id at 1,000.

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion in complete good faith and to avoid arbitrary conduct.

Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 842 (1967).

The ignoring of a grievance may violate the duty. *Id* at 194. The duty is breached when "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. *Id* at 190.

It is clear under the facts of the case at bar that ALPA breached its duty to represent John Dean fairly and equitably. Not only did ALPA attempt to ignore Dean's requests for an accounting, but, it also purposefully and arbitrarily denied any obligation to do so.

Faced with these arbitrary and discriminatory actions taken by ALPA in bad faith, John Dean recognized that his choices of action were limited. The avenue of redress suggested by the Ninth Circuit would force Dean to expend personal funds to force ALPA to fulfill a duty it was previously

obliged to fulfill. In effect, this avenue of redress penalizes Dean threefold; first, by forcing him to accept ALPA's wrongful refusal to account as requested, second, by forcing Dean to continue making the unlawful payments while, third, expending personal funds to litigate the issue in Federal Court. Not only is this avenue of redress unfair and burdensome to Dean while favoring the party (ALPA) in breach of duty and acting in bad faith, but it is uncalled for under current controlling authority. *See, Brotherhood of Railway and Steamship Clerks v. Allen* supra at 120.

> The court has made clear, however, that the exhaustion requirement is subject to a number of exceptions for the variety of situations in which doctrinaire application of the exhaustion rule would defeat the overall purposes of federal labor relations policy.

Glover v. St. Louis-S.F.R. Co., 393 U.S. 324, 329-30, 89 S. Ct. 548, 21 L. Ed 2d 519 (1968).

Similarly, the Court may consider the special circumstances present in the case at bar so long as the consideration does not defeat the overall purposes of federal labor policy. The policy at issue here is the elimination of the non-union "free-rider" enjoying the benefits of a union negotiated contract while not paying for his proportionate share of the costs of collective bargaining. *See, International Association of Machinists v. Street, Supra.*

The special circumstances this Court must consider begin with the fact that Dean is a non-union member of a collective bargaining unit forced to pay an amount equivalent to union dues as a condition of continued employment; that Dean never stopped paying dues to ALPA, but, merely reduced his payment to reflect his own best estimate of his proportionate share of collective bargaining costs; that the TWA/ALPA agency-shop agreement states that non-union member pilots are required to pay only their proportionate share of costs incurred in collective bargaining; that ALPA breached this agreement and the duty it owed to John Dean to represent him fairly by refusing to account for expenditures non-germane to collective bargaining as mandated by Supreme Court authority and specifically cited to in letters from Dean

to ALPA; and that ALPA caused Dean's termination in bad faith and with unclean hands.

In conclusion, this Court should grant this writ because conflicting authority exists amongst the Circuit Courts of Appeal over agency-shop labor provisions and the duties owed by unions to non-member employees as a result of such provisions; and because confusion exists amongst the Circuits as to what circumstances compel relief for a dissenting non-member employee prior to final judgment.

II

Dean's right to freedom of speech and freedom of association guaranteed by the First Amendment to the Constitution of the United States was violated. Insofar as service charges are used to finance expenditures by a union for collective bargaining, contract-administration, and grievance adjustment purposes, an agency shop agreement is constitutionally valid. *Railway Employee Dep't. v. Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed, 1112 (1956); *International Association of Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 1141 (1961). However, a union does not have the power, over an employee's objection, to use his exacted funds to support political cause which he opposes. *Street, supra.*

ALPA used funds exacted from Dean for political purposes despite Dean's objections. The union refused to account to Dean for the funds or reduce the payments by the amount used for political purposes. The funds were exacted from Dean under the threat of job dismissal. ALPA's use of Dean's funds for purposes he objected to hindered his right to free speech by forcing him to associate with causes he opposed and by reducing his ability to further his own views.

> "We held in *Street* that Section 2, Eleventh is to be construed to deny the union, over an employee's objection, the power to use his exacted funds to support political causes which he opposes..."
>
> The position taken by the court in *Hanson, Street* and *Allen* is strong medicine. It is not equivocal. Indeed, it contains constitutional overtones which appear to be foregone only by use of statutory construction to avoid First and Fifth Amendment

> issues... the diversion of the employee's money from use for purposes of which it was exacted damages them doubly. The utilization of union dues to support candidates and causes that the plaintiff opposes renders the plaintiff captive to the ideas, association and causes espoused by the union. At the same time, it depletes their own funds and resources to the extent of the expropriation and renders them unable by these amounts to express their own convictions and their own ideas and to support their own causes.

Seay v. McDonnell - Douglas, 427 F. 2d 996,999 (9th Cir. 1970).

The court in *Seay* recognized the potential for violations of individual rights that could occur by requiring payment of service charges from non-member employees. As mentioned above, the *Seay* court also recognized the fiduciary duty of a union to deal fairly and equitably with the people it represents. Although the constitutional issues were not squarely presented in *Seay*, the court nevertheless felt obligated to comment on the potential First Amendment violations. In the case at bar, however, the same court that decided *Seay* failed to consider that case or the issues discussed in it, even though ALPA had blatantly breached it's fiduciary duty and had violated Dean's rights. The constitutional violations not squarely before the Court in *Seay* must be dealt with in this case.

It is important to consider here that Dean was only obligated under the agency shop agreement to pay for his share of the collective bargaining expenses. He was forced to further contribute, however, to purposes he was opposed to under the threat of losing his job.

The principles that under the First Amendment and individual should be free to believe as he will and that in a free society one's beliefs should be shaped by his own mind and conscience prohibit a union from requiring any employee represented by the union to contribute to the support of an ideological cause he may oppose as a condition of holding a job. *Abood v. Detriot Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed 2d 261 (1976). The Constitution requires that a union's expenditures for ideological causes not germane to its duties as a collective bargaining representative be financed

from charges, dues, or assessments paid by employees who do not object to advancing such causes and who are not coerced into doing so against their will by the threat of loss of their employment. *id* at 234.

Since Dean paid his dues under the threat of losing his job, the amount he paid above his proportion of the cost of collective bargaining was a wrongful taking of his property without due process. The Fifth Amendment to the Constitution of the United States protects people from being "deprived of life, liberty, or property, without due process of law."

In *Abood, supra*, the agency shop agreement called for non-union members to pay a service charge in an amount equal to union dues for the benefits they received. The court held in that case that even though the agency shop agreement was valid under *Hanson* and *Street* and non-members paid the same amount as members, the union still could not use funds for ideological causes objected to by an employee.

The case at bar requires even stricter scrutiny than that in *Abood*. Dean and other non-members were only obligated to pay for their share of collective bargaining expenses under Section 3-B of the ALPA/TWA Agency shop agreement. They were not obligated to pay a sum equal to union dues as in *Abood*. Therefore ALPA had an even higher duty than the union in *Abood* to deal fairly with persons it represented because the people would receive no benefit from any money they paid in above the amount agreed to under the contract. ALPA breached this high duty and wrongfully deprived Dean of money without due process by forcing him to pay an amount greater than he was legally obligated to pay. Dean not only received no benefit from the tender of the excess amount, but was further damaged by having that money used for causes he was opposed to.

ALPA further violated Dean's Fifth Amendment rights by discharging him for failing to pay the excessive amount. The right to hold specific private employment and to follow a chosen profession comes within the "liberty" and "property" concepts of the Fifth Amendment. *U.S. v. Robel*, 389 U.S. 258, 88 S. Ct. 419, 19 L.Ed. 508 (1967).

The due process clause of the Fifth Amendment, at a minimum, requires that deprivation of life, liberty or property

be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Boddie v. Connecticut*, 401 U.S. 971, 91 S. Ct. 780, 28 L.Ed.2d. 113 (1971). Dean did not receive notice of his termination until after he was discharged and therefore had no opportunity whatsoever for a hearing.

The ALPA/TWA agency shop agreement contains a notice provision, but it was not adhered to. Under Section 3-B of the agreement, Dean had 15 days from the *receipt by him* of notice of termination to make the requested payments. Dean was given 15 days from the date of the letter to make the payments, but he did not receive the letter until after his discharge. Neither ALPA nor TWA made any other attempts to contact Dean. Upon receipt of the letter, Dean immediately tendered the requested amount in order to retain his job, but his tender was refused.

Employees should be given a reasonable time in which to pay the appropriate unions all sums required under the agreement, including arrears, that are owing. *Allen*, 373 U.S. at 120. Even though Dean had already paid all the sums required under the agreement, he should have been given a reasonable opportunity to make the requested payments and retain his employment until the dispute could be resolved in the courts.

CONCLUSION

For the reasons noted above, petitioner prays that this court reverse the decision of the Court of Appeals and reinstate the District Court's Order Granting Partial Summary Judgment.

Respectfully submitted,
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By _____
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Respectfully submitted,

By _____
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DEAN,	)	NO. 82-3133
Plaintiff-Appellee,	)	D.C. # C78-439M
	)	ORDER
v.	)	
	)	
TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
Defendants-Appellants.	)	

Before: BROWNING, Chief Judge, FLETCHER and POOLE, Circuit Judges.

The panel as constituted in the above-entitled case has voted to reject the suggestion for rehearing en banc. No petition for rehearing was requested.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DEAN,	)	
	)	No. 82-3133
Appellee,	)	
	)	DC No. C78-439M
v.	)	
	)	
TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	OPINION
Appellant.	)	

Appeal from the United States District Court
for the Western District of Washington
Honorable Walter T. McGovern, Judge, Presiding
Argued and Submitted January 7, 1983

Before: BROWNING, Chief Judge, FLETCHER and POOLE, Circuit Judges.*

PER CURIAM:

Appellants Trans World Airlines, Inc. ("TWA") and Air Line Pilots Association, International ("ALPA" or "the union") appeal the district court's grant of summary judgment in favor of appellee John Dean. We reverse.

FACTS

Dean, a pilot employed by TWA, was required by an agency shop agreement between TWA and ALPA to pay an agency fee to ALPA. He protested the charge, which he chracterized as an "unconstitutional tax," in numerous letters to ALPA during 1976 and 1977. He accused the union, among other things, of using his fees for political expenditures in

violation of the Supreme Court's holding in *International Association of Machinists v. Street*, 367 U.S. 740 (1961). Unsatisfied with ALPA's response that his dues were not used for any political or ideological cause, Dean decided unilaterally to reduce his monthly payment to the union. He was sent several delinquency notices, including an itemized bill of all amounts owed. Finally, at ALPA's request and pursuant to the agency shop agreement, TWA discharged Dean.

Dean sued for breach of contract and breach of the duty of fair representation. The district court granted his motion for partial summary judgment, ruling as a matter of law that Dean had raised a proper spending challenge under Street, and that his discharge was therefore unlawful. TWA was then ordered to reinstate Dean.

ANALYSIS

International Association of Machinists v. Street, 367 U.S. 740 (1961), prohibits unions from using the dues of a protesting employee to support political and ideological causes which the employee opposes. In *Street*, however, and later in *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963), the Supreme Court very clearly held that protesting employees are not released from their dues-paying obligation simply because they believe that a portion of their dues is being used for political or ideological expenditures. The Court stated in *Street*:

> The [employees] who have participated in this action have in the course of it made known to their respective unions their objection to the use of their money for the support of political causes. In that circumstance, the respective unions were without power to use payments thereafter tendered by them for such political causes. However, the union-shop agreement itself is not unlawful. [Citation omitted.] ***The [protesting employees] therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement.***

367 U.S. at 771 (emphasis added). To allow an injunction restraining dues collections might, the Court explained, "interfere with the ... unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry." *Id.*

In *Allen*, the court went one step further and held that

> lest the important functions of labor organizations under the Railway Labor Act, be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered.*

373 U.S. at 120 (emphasis added).

If courts cannot enjoin the collection of union dues, then certainly an individual should not be permitted unilaterally to decide to reduce or stop dues payment. Yet the district court in the instant case in essence approved Dean's self-help injunction. Under *Street* and *Allen*, it would have been appropriate for Dean to seek judicial relief by way of either (1) a rebate for political and ideological expenditures or (2) a narrowly drawn injunction prohibiting the use of a portion of his dues for political and ideological expenditures. 367 U.S. at 774-75; 373 U.S. at 120-23. Under *Allen*, the union would have had the burden of proving the proportion of political to total union expenditures. 373 U.S. at 122. Dean did not pursue the proper avenue for redress of his grievance. The district court erred, therefore, when it granted summary judgment in his favor.

The judgment of the district court is reversed and the cause is remanded with instructions to vacate the order granting partial summary judgment and the injunction, and to try the case on the merits.

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*The panel which heard oral argument consisted of Chief Judge Browning and Judges Fletcher and Pregerson. Subsequently, Judge Pregerson recused and pursuant to the Court's procedures Judge Poole was drawn by lot to replace Judge Pregerson. Judge Poole participated by reading the briefs and record and listening to the tape of oral argument.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

JOHN DEAN, Plaintiff,	)	No. C78-439M
v.	)	
TRANSWORLD AIRLINES, INC. and AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, Defendants.	)	ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER comes on to be heard before the undersigned Judge of the above-entitled Court upon Plaintiff's Second[1] Motion for Summary Judgment against defendants TWA and ALPA on all issues of liability raised in the first and second causes of action of the amended complaint.[2] Also before the Court are the cross-motions for summary judgment of defendants TWA and ALPA.

The first cause of action of the amended complaint alleges that effective August 11, 1977, TWA discharged Dean in violation of the terms of both the collective bargaining agreement and the Railway Labor Act. Dean alleges *inter alia* that his discharge by TWA was unlawful in that the notice provisions of the contract were not satisfied, and that ALPA breached "its duty of fair representation without discrimination" in connection with his discharge.

Dean was discharged by TWA for an alleged delinquency in the payment of service charges to ALPA. The second cause of action alleges that ALPA by commission and omission breached its duty of fair representation without discrimina-

tion in response to Dean's spending claim and his demands for an adjustment in his service charges.

John Dean was employed by TWA as a pilot with the title "First Officer" (co-pilot) from February 1966 until discharged by TWA on August 11, 1977. He became a member of ALPA in 1966 and resigned that membership, effective 1972.

In 1975, ALPA and TWA negotiated an "Agency Shop" agreement, which was incorporated into the collective bargaining agreement as Section 3-B. Section 3-B imposed a "service charge" on non-member pilots "in an amount equal to the Association's regular and monthly dues uniformly required" of ALPA members, effective January 1976.

Dean's written objections commenced with the inauguration of the agency shop service charges. He challenged the use of his service charges for purposes unrelated to the administration of the TWA-ALPA agreement. On March 15, 1976, Dean demanded in writing a reduction and refund under the authority of *I.A.M. v. Street*, 367 U.S. 740 (1961) and *B.R.C. v. Allen*, 373 U.S. 113 (1963). In response to Dean's letter of March 15, 1976, ALPA on March 31, 1976, responded in part as follows:

> We have discussed the Supreme Court cases mentioned in your letter with legal counsel and are advised that those decisions do not require any alteration in your service charge, or in the explanation of its method of billing previously afforded you by letter dated February 17, 1976.

A more inaccurate assessment of ALPA's duties under the *Street* and *Allen* decisions in response to Dean's spending claim was scarcely possible. ALPA's dealings with Dean from January 1976, until his discharge in August 1977, were consistent with that assessment.

That Dean was discharged because of an alleged delinquency in the payment of service charges is not disputed. Dean insisted on monthly billings. His statement of account for July 1976, shows that payment of $53.37 was due by July 25, 1976. His check in the amount of $54.00 payable to ALPA was negotiated well before that date. Nevertheless, his state-

ment of account for August 1976, listed his standing as "bad", for the first time.[3] ALPA's letter dated August 12, 1976, advised Dean that he was delinquent in the amount of $86.78 and demanded that he remit that amount within 15 days or be discharged. The statement of August 1976, showed that $86.78 was due by August 25, 1976.

By letter dated August 9, 1976, Dean had challenged the $86.78 figure, ALPA's assessment of his standing as "bad", and requested an accounting of ALPA's spending vis-a-vis contract negotiations with TWA. From that point forward, the record suggests that Dean's resistance hardened. His payments were no longer sufficient to cover the minimum amounts assessed as due. He renewed his accounting/adjustment demands in September, October, November, December and thereafter. He renewed his reliance on *Street* and *Allen, supra*, and beginning December 1976, in the absence of the information requested, Dean reduced his monthly payment to $10.00, his estimated share of "TWA's contract negotiations and related costs."

Dean contends that he did not receive ALPA's 15-day termination notice dated June 29, 1977, and that he was not aware of his impending discharge until the day following its effective date. In a telephone conversation on August 16, 1977, TWA's Hilly told Dean that he had been in touch with ALPA's Margo Hallisay, who informed Hilly that if Dean were to make payment of $418, his termination would be rescinded. *See* Hilly deposition at pp. 35, 38 and 40. Dean sent ALPA a check for $418.10. ALPA returned the check unnegotiated on August 19, 1977. Dean's statement of account for September 1977, showed a minimum amount due in the sum of $459.06 on a balance of $581.67. On or about September 15, 1977, Dean sent ALPA a check for $459.10. That check was returned to Dean unnegotiated.

Plaintiff earlier invited the Court to conclude that Dean's service-charge obligation did not extend beyond his reasonable share of the cost of ALPA's collective-bargaining activity on behalf of Dean's employer. During oral argument, plaintiff's counsel stated that a determination of that question is not yet required if the Court should now rule as it does here. The Court is of the opinion that Dean's "failure to represent

fairly" claim should be resolved without reaching the question of a dissenter's obligation, if any, to contribute to the cost of ALPA's collective bargaining industry-wide, and therefore declines to decide that question. As will later appear, we are primarily concerned here not with the exact amount of Dean's service charges, but with ALPA's outright refusal to make any adjustment whatsoever in response to the plaintiff's spending claim. If necessary, the question of the amount of plaintiff's service charges can hereafter be addressed.

The *de lege* amount of Dean's service charge delinquency, if any, at the time of his discharge has not been established. That would have required a determination of (1) the total amount of ALPA's expenditures during the period between January 1, 1976 and August 11, 1977, and (2) what portion of that amount was spent by ALPA on collective bargaining contract administration and grievance adjustment. A protesting pilot would be entitled under applicable case law to recover from his dues or service charge payments in the same proportion that ALPA's expenditures for other purposes bore to ALPA's total expenditures. *See Street* at 774-75, and *Allen* at 121-22.

However, the amount of Dean's delinquency, if any, indeed, whether he was or was not delinquent, is not material to the fair representation issue, and the Court so holds.

ALPA concedes that at all times material, it spent money for purposes other than collective bargaining. *See*, for example, the stipulation filed June 25, 1981, paragraph 16. *See* ALPA's brief at page 6, in response to plaintiff's motion to compel answers to interrogatories and request for production of documents, filed in the cause on February 4, 1981. At least with respect to political expenditures, ALPA's duty to Dean under the *Street* and *Allen* decisions is clear and unmistakable.[4] *See also Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Dean, in 1976, deserved the benefit of the rebate policy implemented and expanded by ALPA between August 1978 and November 1979. The fact that Dean perceived his service charge obligation as limited to his fair share of the costs incurred by ALPA only in connection with its agreement with TWA, did not relieve ALPA of its affirmative duties under the above authorities.

The Court includes that in refusing Dean's request for an adjustment, ALPA breached its duty to represent him fairly. *Seay v. McDonnell Douglas Corporation*, 427 F.2d 996 (9th Cir. 1970); *Seay v. McDonnell Douglas Corporation*, 533 F.2d 1126 (9th Cir. 1976); and *Ellis v. BRAC*, 91 LRRM, 2339, 2343 (S.D. Ca. 1976). When ALPA proceeded against Dean as delinquent in the payment of his service charges, it did so with unclean hands.

A ruling that Dean be required to pay forthwith all sums required under the agreement, including arrears, if any, that are owing for the period January 1, 1976 to date of reinstatement, is supported by the Street opinion at 771 and the *Allen* opinion at 120. This Court is of the opinion that the rationale expressed in *Allen* is equally compelling here. Within 15 days of the entry of this Order, ALPA shall advise Dean of the dollar amount of the balance currently due on his service charges. Upon receipt of that information, Dean shall within 15 days pay ALPA that sum of money.[5] If he fails to do so, his action shall be dismissed.

Having concluded that material factual issues as to plaintiff's fair representation claim do not exist, the Court finds that his discharge, whether or not in derogation of the notice provisions of Section 3-B of the agreement, was unlawful as a matter of law as well.

The Court, having considered the entire record, including but not limited to the motions, memoranda, affidavits, stipulations and exhibits, having heard the instant motions argued in open court, and being fully advised, NOW THEREFORE

IT IS ORDERED that the motions of defendants TWA[6] and ALPA for summary judgment be and the same are hereby DENIED; and

IT IS ORDERED that the motion of the plaintiff for summary judgment on all issues of liability raised in the first and second causes of action of the amended complaint be and the same is hereby GRANTED.

The Clerk of the Court shall direct uncertified copies of this Order and the Judgment entered pursuant thereto to counsel of record.

DATED this 8th day of September, 1981.

WALTER T. McGOVERN
Chief United States District Judge

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1 Prior motions for summary judgment against TWA and ALPA were filed on May 10, 1979 and denied on June 26, 1979. Those motions sought judgment only on plaintiff's unlawful discharge claim. *See* memorandum in support at p. 1, lines 20-26.

2 The Amended Complaint for Breach of Contract and Breach of Duty of Fair Representation was filed on September 25, 1980.

3 No statement of account for June 1976, or related appear in the record. *See* Agreed Exhibit 20 to Recital of Stipulated Facts, and the affidavit of John Dodge.

4 ALPA asks this Court to read out of the plaintiff's protests any objection under the Street and Allen cases to ALPA's non-collective bargaining expenditures. The record before the Court permits of no such reading.

5 It remains to be determined whether Dean is entitled to a refund under the formula developed in the decisions discussed in this Order. *See also Beck v. C.W.A., 468 F.Supp. 93 (D. Md. 1979); Racine Education Association v. Racine Unified School District*, 82 F.R.D. 461 (E.D. Wis. 1979); and *Ball v. City of Detroit*, 269 N.W.2d 607 (Mich. 1978).

6 TWA argues that it had no option in the discharge of the plaintiff; that its contract with ALPA required TWA to discharge the plaintiff when ALPA notified TWA that the plaintiff was delinquent in the payment of his service charges. That reasoning might support a claim over by TWA against ALPA, but it constitutes no defense for TWA against the plaintiff's unlawful discharge claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICTCOURT

WESTERN DISTRICT OF WASHINGTON

JOHN DEAN,	)	
	)	
Plaintiff,	)	NO. C78-439M
	)	
v.	)	
	)	
TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
	)	
Defendants.	)	

The plaintiff's Motion for Permanent Injunction having come on for consideration and the Court having considered the entire record including but not limited to the authorities, argumentation and affidavits advanced in support of and opposition to the instant motion, and having entered its Order granting the relief requested, the Court makes and enters what it finds to be undisputed findings of fact together with its conclusions of law which follow from those undisputed findings of fact, all in support of the Court's Permanent Injunction.

UNDISPUTED FINDINGS OF FACT

1. Plaintiff was employed by TWA as a pilot with the title "First Officer" (co-pilot) from February 1966 until discharged by TWA on August 11, 1977.

2. Plaintiff became a member of ALPA in 1966 and resigned his membership, effective in 1972.

3. In 1975, ALPA and TWA negotiated an agency shop agreement, imposing a service charge on nonmember pilots equal in amount to ALPA's regular membership dues.

4. Plaintiff challenged the use of his service charges for purposes unrelated to the administration of the TWA-ALPA agreement and made repeated demands for an accounting under the authority of *I.A.M. v. Street*, 367 U.S. 740 (1961) and *B.R.C. v. Allen*, 373 U.S. 113 (1963).

5. ALPA refused to make any adjustment in plaintiff's service charges in response to his spending claim, although it did expend funds for purposes other than collective bargaining, and later implemented a rebate policy.

6. Plaintiff reduced his service charge payments and on August 11, 1977, he was discharged by TWA for his alleged delinquencies therein.

7. ALPA computed the balance alleged due on plaintiff's service charges as of August 11, 1977, at $527.67, which sum has now been paid to ALPA by plaintiff.

8. Plaintiff's first cause of action alleged unlawful discharge. The second alleged ALPA's failure to represent him fairly. On September 8, 1981, the Court granted the plaintiff's motion for summary judgment on all issues of liability raised in his first and second causes of action.

9. On October 9, 1981, TWA in writing denied plaintiff's request for reinstatement.

10. On December 8, 1981, in an *addendum* to its Order of September 8, 1981, the Court, having observed that plaintiff is assuredly entitled *inter alia* to reinstatement, urged the defendents to commence negotiations for the development of an appropriate remedy in the case at bar.

11. Defendants take the position that all remedy issues should be resolved together in one final judgment to avoid multiple appeals and that no compelling reasons have been presented that would warrant the grant of immediate innunctive relief. *See* Daniel S. Kozma's letter to the Court, dated December 16, 1981, a copy of which follows as Attachment A. Said letter is incorporated herein by reference as if fully set forth.

12. In its memorandum in opposition to the injunctive relief requested, ALPA submits that the plaintiff's "only possible injury is his loss of earnings," and contends that a showing of irreparable harm and the inadequacy of a remedy at law has not been made. Further that the Norris-LaGuardia

Act, 29 U.S.C. § *et seq.* prohibits the grant of injunctive relief in cases growing out of a labor dispute except after hearing and unless supported by detailed findings of the Court.

13. The plaintiff was discharged by TWA on August 11, 1977, at the age of 44. Plaintiff will be 49 years old on March 3, 1982.

CONCLUSIONS OF LAW

1. Defendant ALPA breached its duty of fair representation to plaintiff in refusing his request for an adjustment of his service charges.

2. In proceeding against plaintiff as delinquent in the payment of his service charges, ALPA did so with unclean hands.

3. The subsequent discharge of plaintiff, whether or not in derogation of the notice provisions of Section 3-B of the labor agreement, was unlawful as a matter os law.

4. The prerequisites for the injunctive relief requested have been satisfied.

5. The likelihood of success on the merits of his lawsuit weigh heavily in plaintiff's favor.

6. The plaintiff is in immediate danger of irreparable harm in that his professional career as a commerical airline pilot is in jeopardy by reason of his unlawful discharge.

7. The plaintiff's possible injuries are not limited to the temporary loss of income.

8. A Norris-LaGuardia "labor dispute" barring injunctive relief does not arise here out of a discharge which is unlawful as a matter of law.

9. Reinstatement here will vindicate the processes of the Railway Labor Act for the final resolution of minor disputes.

10. The plaintiff when qualified is entitled to reemployment with TWA in a position substantially equivalent to that which he would have attained had he not been discharged.

11. The plaintiff is entitled to reinstatement and the defendants must initiate the process of his reinstatement forthwith.

ALPA and TWA relieved themselves of a troublesome employee five years ago next August. In discharging or causing the discharge of the plaintiff, ALPA knowingly and deliberately breached its duty to represent him fairly.

The defendants' liability is clear. The plaintiff's injuries are grave. Further delay in redressing those injuries offends even the elementary fairness to which the Court is committed.

The mandatory relief requested must be granted.

The Clerk of the Court shall direct copies of the foregoing Findings of Fact and Conclusions of Law together with the Court's Order on Motion for Permanent Injunction to counsel of record.

DATED this 3rd day of February, 1982.

WALTER T. McGOVERN
Chief United State District Judge

ORDER ON MOTION FOR PERMANENT INJUNCTION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOHN DEAN,	)	
	)	
Plaintiff,	)	No. C78-439M
	)	
v.	)	
	)	
TRANS WORLD AIRLINDS, INC., and AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,	)	ORDER ON MOTION FOR PERMANENT INJUNCTION
	)	
Defendants.	)	

THIS MATTER comes on for consideration by the undersigned Judge of the above-entitled Court upon plaintiffs Motion for Injunctive Relief in the form of mandatory reinstatement. The motion was originally noted for the Court's consideration on November 13, 1981, after the Court had entered judgment in favor of the plaintiff on all issues of liability raised in the first and second causes of action of the

amended complaint. For reasons which appear in its Supplemental Order of December 8, 1981, the Court continued its consideration of the instant Motion for Permanent Injunction to December 18, 1981.

The plaintiff seeks reemployment in a position substantially equivalent to that which he would have attained had he not been discharged, based upon the authority of *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 103 (3rd Cor. 1968), *cert. denied*, 393 U.S. 1048 (1969) and *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031, 1034 (9th Cir. 1970).

Defendant ALPA opposes the relief requested on the grounds, *inter alia*, that a showing of irreparable harm and the inadequacy of a remedy at law has not been made. Further that such injunctive relief is prohibited by the Norris-LaGuardia Act in cases growing out of a labor dispute, except after hearing the testimony of witnesses in open court and after findings of fact by the Court. Title 29, United States Code, Section 107.

Page 2 of ALPA's memorandum in opposition to the plaintiff's motion for permanent injunction reads, in part, as follows:

> ALPA submits that the only possible injury is his loss of earnings, which Plaintiff concedes he has coped with for four years.

ALPA cites authority for the proposition that "the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury."

This Court does not share the opinion that the plaintiff's only possible injury is his temporary loss of income. The plaintiff's career as a commercial airlines pilot was interrupted, suspended unlawfully in August 1977. It remains to be determined whether his career was effectively terminated at that time. And even if an adequate legal remedy can be fashioned for such an injury, the Court is not inclined to deprive the plaintiff of an immediate opportunity to salvage his career as a commercial airlines pilot, if he can.

The Court is of the opinion that the plaintiff's professional career is in jeopardy by reason of his unlawful discharge and that he is accordingly in immediate danger of irreparable harm.

ALPA's reliance on the Norris-LaGuardia Act is misplaced. ALPA's case law itself supports the conclusion that in the instant circumstances, a Norris-LaGuardia "labor dispute" does not arise out of a discharge which is unlawful as a matter of law. *Order of Railroad Telegraphers v. Chicago & North Western Railway, Co.*, 362 U.S. 330, 340-341 (1960).

Conceding that in a proper case, the Norris-LaGuardia Act is no bar to the use of injunctive relief to vindicate the processes of the Railway Labor Act, *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 40-41 (1957), ALPA suggests that no violation of a basic command of the Railway Labor Act was made out in the case at bar.

On the contrary, ALPA acts as bargaining agent for TWA pilots under the Railway Labor Act. The Act imposes a duty on such an agent to exercise the power conferred upon it in behalf of those for whom it acts.

> The use of the word 'representative,' as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent.
>
> *Steele v. Louisville & Nashville Railroad, Co.*, 323 U.S. 192, 199 (1944).

In discharging, or causing the discharge of the plaintiff unlawfully, ALPA breached its statutory duty. Compare, *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 773 (1952). ALPA's breach gave rise under the Railway Labor Act to the plaintiff's first cause of action.

Reinstatement here can in no way upset the natural interplay of the competing economic forces of capital and labor. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., supra*, 353 U.S. at 40. It will, in fact, vindicate the processes provided by the Railway Labor Act for the final resolution of minor disputes. *Federal Express Corporation v. Teamsters Union Local #85*, 617 F.2d 524, 526 (9th Cir. 1980).

It being the opinion of the Court that the plaintiff is entitled under the authorities advanced to an order requiring his reemployment when qualified in a position substantially equivalent to that which he would have attained had he not been discharged, NOW, THEREFORE

IT IS ORDERED that defendants Trans World Airlines and the Airline Pilots Association initiate immediately the process of plaintiff's reinstatement.

The Clerk of the Court shall direct copies of this Order together with the Findings of Fact and Conclusions of Law entered in support of it to counsel of record.

DATED this 3rd day of February, 1982.

WALTER T. McGOVERN
Chief United States District Judge

RECITAL OF STIPULATED FACTS BETWEEN PLAINTIFF AND AIR LINE PILOTS ASSOCIATION INTERNATIONAL; EXHIBITS 3, 10, 11, 12, 15, 16, 78, 82.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

JOHN DEAN, Plaintiff,	)	NO. C78-439M
v.	)	RECITAL OF STIPULATED FACTS BETWEEN PLAINTIFF AND DEFENDANT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, Defendants.	)	

Plaintiff, John Dean, and Defendant, Air Line Pilots Association, International, by agreement of their respective attorneys, hereby stipulate, for the purpose of cross motions for summary judgment to be filed by the parties in this action, that the following facts are deemed to be true, and form a part of the factual record before the Court for this purpose. The parties further stipulate that the documents attached hereto, and identified herein as Agreed Exhibits, are true and accurate copies of the original documents and are part of the factual record before the Court. Accurate, typed transcriptions of originial handwritten documents are attached to copies of the original for the convenience of the Court. The phrase "at all material times" means since December 31, 1975.

The Parties

1. Plaintiff, John Dean was employed as a pilot with the title "First Officer" (co-pilot) by Defendant Trans World Airlines, Inc. ("TWA"), from February, 1966 until his employment was terminated by TWA on August 11, 1977.

2. Defendant Air Line Pilots Association, International ("ALPA") is an unincorporated association maintaining its headquarters office at 1625 Massachusetts Avenue, N.W. Washington, D.C. 20036. ALPA is the recognized exclusive collective bargaining "representative", within the meaning of the Railway Labor Act, 45 U.S.C. § *et seq.*, for all airline pilots employed by twenty-nine air carriers in the United States, in-

cluding Trans World Airlines, Inc. ALPA negotiates, maintains and administers separate collective bargaining agreements with each of the 29 airlines. These agreements establish the wages, hours and other terms and conditions of employment for the airline pilots employed by each airline. The total number of pilots represented by ALPA exceeds 30,000. At all material times, ALPA has been the collective bargaining representative for all airline pilots employed by TWA.

3. TWA is an air carrier within the meaning of the Railway Labor Act, 45 U.S.C. §151, *et seq.*, and is incorporated under the laws of the State of Delaware, with its principal office at 605 Third Avenue, New York, New York, 10016.

4. Plaintiff, John Dean, became a member of ALPA in February, 1966. During the time he was an ALPA member Plaintiff satisfied his dues obligations to ALPA in accordance with the provisions of Article IX of the ALPA Constitution and By-Laws. A copy of the ALPA Constitution and By-Laws in effect for the year 1976 is attached as Agreed Exhibit 1. Effective September 20, 1972 Plaintiff resigned his membership in ALPA and since that time he has not been a member of ALPA.

The following letters identified by date, sender and addressee, were mailed by the sender to the addressee on or shortly after the designated date and were received by the addressee shortly thereafter. These letters concern Plaintiff's resignation of membership in ALPA and are identified as Agreed Exhibits as follows:

Date	From	To	Agreed Exhibit No.
9-20-72	Dean	J.J. O'Donnell (ALPA)	2
10-4-72	L.T. Jones (ALPA)	Dean	3
10-10-72 (misdated 9/10/72)	Dean	L.T. Jones (ALPA)	4
12-2-72	Dean	J.J. O'Donnell (ALPA)	5
1-8-73	J.J. O'Donnell (ALPA)	Dean	6

1-15-73	Dean	J.J. O'Donnell (ALPA)	7
2-5-73	J.J. O'Donnell (ALPA)	Dean	8
2-20-73	L.T. Jones (ALPA)	Dean	9

Agency Shop; Service Charge Requirement

5. In 1975, ALPA and TWA negotiated an "Agency Shop" agreement, which was incorporated into the ALPA/TWA collective bargaining agreement as Section 3-B. A copy of this agreement is identified as Agreed Exhibit 10. Section 3-B became effective on January 1, 1976. By early 1976, Plaintiff had a copy of the ALPA/TWA collective bargaining agreement, and was familiar with the provisions of Section 3-B.

6. On November 1 4, 1975, and December 19, 1975, Robert Sherman, a TWA pilot, ALPA member, and Secretary/-Treasurer of the ALPA/TWA Master Executive Council, sent letters to Plaintiff regarding the imposition of the agency shop agreement. Plaintiff received letters which are identified respectively as Agreed Exhibits 11 and 12.

7. Each of the following letters, identified here by date, sender, and addressee, was mailed by the sender via United States mail on or shortly after its listed date, and was received by the addressee. A copy of each letter is identified as a numbered Agreed Exhibit as shown.

Date	From	To	Agreed Exhibit No.
1-22-76 (Misdated 12-22-76)	Dean	ALPA	13
2-17-76	Magee (ALPA)	Dean	14
3-15-76	Dean	ALPA	15
3-31-76	Magee (ALPA)	Dean	16
4-10-76	Dean	ALPA	17

8-9-76	Magee	ALPA	18
8-12-76	Magee (ALPA)	Dean	19
9-14-76	Dean	ALPA	20
10-12-76	Dean	ALPA	21
11-5-76	Marcione (ALPA)	Dean	22
11-14-76	Dean	ALPA	23
12-15-76	Dean	ALPA	24
1-15-77	Dean	ALPA	25
2-13-77	Dean	ALPA	26
3-17-77	Leanna Krall (ALPA)	Dean	27
3-25-77	Magee (ALPA)	Dean	28
3-27-77	Dean	ALPA	29
4-13-77	Dean	TWA	30
4-15-77	Dean (ALPA)	Magee	31

8. In early 1977 a copy of the "ALPA Annual Dues Payment Plan" was sent to and received by Plaintiff. A copy of this document is Agreed Exhibit 32.

9. Each of the following ALPA "Statements of Account," identified here by the "statement date" shown on the statement, was mailed by ALPA to Plaintiff via United States mail on or about the date indicated, and was received by Plaintiff. A copy of each statement is identified as a numbered Agreed Exhibit as shown.

Date	Agreed Exhibit Number
January 2, 1976	33
February 2, 1976	34
March 1, 1976	35

April 1, 1976	36
May 1, 1976	37
July 1, 1976	38
August 1, 1976	39
September 1,1976	40
October 1, 1976	41
November 1, 1976	42
December 1, 1976	43
January 1, 1977	44
February 1, 1977	45
March 1, 1977	46
April 1, 1977	47
May 1, 1977	48
June 1, 1977	49
July 1, 1977	50
August 1, 1977	51
September 1, 1977	52

10. A "Financial Account Summary for the Year Ending 12/31/76" was mailed by ALPA to Plaintiff via United States mail in early 1977, and was received by Plaintiff. A copy of this document is identified as Agreed Exhibit 53.

11. Each of the following checks from Plaintiff to ALPA, identified here by date and amount, was mailed by Plaintiff to ALPA via United States mail, was cashed by ALPA, and credited to Plaintiff's service charge account. Beginning in December 1976 and until his termination from employment in August, 1977, Plaintiff reduced his monthly payments to ALPA to $10.00 per month. A copy of each check (front and back) is identified as an Agreed Exhibit as shown:

Date	Amount	Agreed Exhibit No.
January 22, 1976	$33.50	54

February 15, 1976	37.00	55
March 15, 1976	37.00	56
April 15, 1976	37.00	57
May 15, 1976	36.00	58
July 15, 1976	54.00	59
August 15, 1976	37.00	60
September 15, 1976	37.00	61
October 15, 1976	37.00	62
November 15, 1976	35.00	63
December 15, 1976	10.00	64
January 15, 1977	10.00	65
February 15, 1977	10.00	66
March 15, 1977	10.00	67
April 15, 1977	10.00	68
May 15, 1977	10.00	69
June 15, 1977	10.00	70
July 15, 1977	10.00	71

12. In 1978, H.E. Bagnall and fourteen other pilots, not members of ALPA, including, in addition to Bagnall, seven other pilots employed by TWA (Bauer, Hilbink, Kirchoff, LeBoutellier, Longwish, Murray and Vasilaros) filed suit against ALPA challenging, upon a variety of grounds, the imposition of service charges by ALPA upon nonmember pilots. *Bagnall* v. *ALPA*, Civil Action No. 78-128-A; 626 F.2d 336 (4th Cir. 1980). On September 8, 1978, ALPA Treasurer, John Magee wrote to H. E. Bagnall. A copy of this letter is identified as Agreed Exhibit 72. This was the first time ALPA calculated or credited a rebate to any nonmember pilot in response to an objection to alleged "political" expenditures by ALPA.

ALPA Expenditures and Activities

13. At all material times, all pilot payments to ALPA — whether consisting of dues from members or service charges

from nonmembers — have been deposited into a single, common, unsegregated treasury.

14. At all material times, pilot dues and service charge payments to ALPA have been ALPA's principal source of income. Aside from these funds, and the interest earned on them, ALPA has two other sources of income, as described below:

(a) In cooperation with private insurers, ALPA sponsors several insurance programs. To compensate for administering these programs, ALPA receives a portion of the premiums which offsets a major portion of the cost of administration.

(b) ALPA publishes a magazine entitled "Air Line Pilot." As a result, ALPA receives advertising and subscription income which offsets a major portion of ALPA's publishing and distribution costs for that magazine.

15. At all material times, all of ALPA's expenditures, except as is set forth in paragraphs 14(a) and 14(b) above, have been made from a single common treasury described in paragraph 13.

16. At all material times, ALPA has in each calendar year spent money from its treasury for the following purposes:

(a) Negotiation and administration of collective bargaining agreements at each of the 29 airlines where ALPA represents the pilot employees, including TWA.

(b) Defense and prosecution of litigation having as its subject matter the negotiation and administration of collective bargaining agreements and the settlement of adjustment of grievances or disputes on behalf of the pilot employees at each of 29 airlines where ALPA represents the pilot employees, including TWA.

(c) Settlement and adjustment of pilot grievances at each of the 29 airlines where

ALPA represents the pilot employees, including TWA.

(d) Attending conventions or business meetings of other labor unions and organizations including the AFL-CIO.

(e) Preparation, publication and distribution of other ALPA periodicals and publications other than the "Air Line Pilot", containing news and commentary relating to matters of concern to air line pilots.

(f) Recruiting new members and encouraging existing members to retain ALPA membership at each of the 29 airlines where ALPA represents the pilots, including TWA.

(g) Per capita payments, based upon ALPA membership, required for AFL-CIO affiliation.

(h) Charitable contributions (to organizations such as the United Way and the American Heart Association.)

(i) Funding scholarships for children of deceased or medically retired ALPA members.

(j) Providing rent-free space for the operation of a credit union for the benefit of ALPA members.

(k) Performance of administrative and accounting services for the ALPA Political Action Committee, an organization separate from ALPA and funded by voluntary contributions from ALPA members which works to influence legislative and administrative policy pertaining to the airline industry.

(l) Compensation of ALPA members and employees for time spent in working to influence legislative and administrative policy affecting pilots or issues of collec-

tive bargaining within the airline industry.

(m) Attached hereto as Agreed Exhibits 73, 74 and 75 are Financial Statements prepared by ALPA for the years 1976, 1977 and 1978.

17. At all material times, ALPA expenditures relating to individual airlines have fluctuated markedly from year to year depending upon whether contract negotiations are occurring, the number of grievances filed by pilots, the difficulty presented in adjusting, settling or arbitrating those grievances, and the level of other representation activities during each year.

Plaintiff's Residence

18. In December of 1976, Plaintiff purchased Suite 401 in Capitol Lake Towers, a condominium, at 1910 Evergreen Park Drive S.W., Olympia, Washington 98502. Plaintiff completed his move to this condominium suite in March of 1977 and has lived there since that time. Prior to moving to Olympia, Plaintiff lived in Kansas City, Missouri.

19. Since July, 1976, Suite 303 of Capitol Lake Towers has been owned by Charles Dean, Plaintiff's brother, who has never lived there. Later that year, Mary Dean, Plaintiff's mother, moved into this condominium suite, and she has lived there since that time.

20. Capitol Lake Towers has a central mailroom. In this mailroom are individual, locked mailboxes for each condominium unit. Below the mailboxes is a rack where the mailman places mail which is too large for the mailbox.

21. During 1977, Mary Dean had a key to Plaintiff's apartment at Capitol Lake Towers. Also, during the period when Plaintiff was away on flights for TWA in 1977, Mrs. Dean would occasionally pick up mail left outside his mailbox at Capitol Lake Towers, and leave such mail in Plaintiff's apartment.

22. In 1977, prior to his termination from TWA, Plaintiff usually kept a key to his mailbox in a drawer in his dresser in his apartment at Capitol Lake Towers, and Mary Dean knew this.

23. On one occasion after Plaintiff had moved to Olympia in 1977, when Plaintiff's mailbox at Capitol Lake Towers became so full with mail that it was overflowing, Mary Dean used Plaintiff's mailbox key, removed his mail, and placed it in his apartment.

24. In November, 1976, Mr. Glenn C. Davis and his wife, Bunche Davis, were employed by the Capitol Lake Towers Owners Association. Their employment at Capitol Lake Towers terminated in April 1978. While they were employed at Capitol Lake Towers, Davis and his wife lived at Capitol Lake Towers and they often worked out of an office located on the same floor and 30 feet from the central mailroom. A copy of the Davis' employment agreement with the Owner's Association of Capitol Lake Towers, executed on March 17, 1977, is Agreed Exhibit 76.

25. On July 2, 1977, Bunche Davis signed for a registered or certified letter which the postal receipt identifies as being addressed to John Dean at Capitol Lake Towers. A copy of this receipt is Agreed Exhibit 77.

26. During the year 1977 Plaintiff was away from home on TWA flights for an average of thirteen days per month. On some occasions he would be away from home on TWA flights for five consecutive days.

27. During the same period, a substantial majority of TWA pilots were also away from home on TWA flights for approximately thirteen days per month. On some occasions during this period, these pilots would be away from home on TWA flights for five consecutive days.

The May 5th and May 15th Letters

28. On or about May 5th, 1977, ALPA Treasurer John Magee sent a letter to Plaintiff by first class United States mail. Plaintiff received this letter sometime prior to May 15th, 1977. A copy of this letter is identified as Agreed Exhibit 78.

29. On May 15, 1977, Plaintiff sent a letter to John Magee in reply to the letter described in paragraph 28. ALPA received this letter sometime in May. A copy of this letter is identified as Agreed Exhibit 79.

Plaintiff's Termination

30. On June 29, 1977, ALPA Treasurer Magee sent a letter to Plaintiff via United States certified mail, return receipt requested. A copy of this letter is identifed as Agreed Exhibit 80.

31. On July 5, 1977, Mr. Glenn C. Davis signed a postal receipt for the letter described in paragraph 30, and accepted this letter from the mailman. A copy of this receipt, received by ALPA in mid-July, 1977, is identified as Agreed Exhibit 81.

32. On July 29, 1977, ALPA Treasurer Magee sent a letter to TWA Staff Vice President for Labor Relations J.C. Hilly, with a copy to Plaintiff via United States registered mail, return receipt requested. A copy of this letter is identified as Agreed Exhibit 82. On August 5, 1977, the mailman left a Notice of Attempted Delivery regarding this letter in Plaintiff's mailbox at Capitol Lake Towers. A copy of this notice is identified as Agreed Exhibit 83.

33. On August 3, 1977, John F. Rhodes, TWA's General Manager-Flying in Los Angeles, sent a letter to Plaintiff via certified mail, return receipt requested. A copy of this letter is identified as Agreed Exhibit 84. On August 6, 1977, the mailman left a Notice of Attempted Delivery regarding this letter in Plaintiff's mailbox at Capitol Lake Towers. A copy of this notice is identified as Agreed Exhibit 85. A second Notice of Attempted Delivery regarding this letter was left in Plaintiff's mailbox by the mailman on August 11, 1977. A copy of this notice is identified as Agreed Exhibit 86.

34. On August 12, 1977, TWA's Rhodes sent a letter to Plaintiff, via United States certified mail, notifying him that his employment with TWA had been terminated effective August 11, 1977, and informed ALPA of TWA's action. A copy of this letter is identified as Agreed Exhibit 87.

35. On the evening of August 12, 1977, Plaintiff spoke to TWA's Rhodes by telephone. They discussed Dean's discharge.

36. On August 14, 1977, Plaintiff sent identical mailgrams to TWA's Rhodes in Los Angeles and to TWA's Staff Vice President for Labor Relations in New York. The mailgrams

were received on August 15, 1977. Copies of the mailgrams are identified as Agreed Exhibit 88.

37. On August 15, 1977, Plaintiff sent a letter to TWA's Rhodes, via United States mail. A copy of this letter is identified as Agreed Exhibit 89. Plaintiff's check to ALPA dated August 15, 1977, for $10.00, a copy of which is identified as Agreed Exhibit 90, was returned by ALPA to Plaintiff.

38. On August 16, 1977, a second Notice of Attempted Delivery regarding Magee's letter of July 29 was left by the mailman in Plaintiff's mailbox. A copy of this notice is identified as Agreed Exhibit 91. On this same date, Plaintiff signed for the aforementioned letters of July 29, (Agreed Exhibit 82), August 3 (Agreed Exhibit 84), and August 12 (Agreed Exhibit 87) at the Olympia Post Office.

39. On August 16, 1977, Plaintiff sent a letter to ALPA, via United States mail, and enclosed a check to ALPA for $418.20. A copy of this letter is identified as Agreed Exhibit 92, and a copy of this check is identified as Agreed Exhibit 93.

40. On August 18, 1977, Plaintiff sent a letter to TWA's Staff Vice President for Labor Relations, with a copy of TWA's Flight Operations Department, via United States mail. The letter, and the copy, were received by the intended addressees. A copy of this letter is identified as Agreed Exhibit 94.

41. On August 19, 1977, John Dodge of ALPA sent a letter to Plaintiff, via United States mail, returning Plaintiff's August 16th check. This letter was received by Plaintiff. A copy of the letter is identified as Agreed Exhibit 95.

42. On August 26, 1977, Plaintiff sent a letter to John Dodge of ALPA via United States mail, and the letter was received by Dodge. A copy of this letter is identified as Agreed Exhibit 96.

43. On or about September 15, 1977, Plaintiff sent ALPA a check for $459.10. This check was returned by ALPA. A copy of this check is identified as Agreed Exhibit 97.

44. Plaintiff has not been reinstated to his employment with TWA.

45. No hearing has been held under the ALPA/TWA col-

lective bargaining agreement with respect to Plaintiff's discharge.

46. Since January 1, 1976, the effective date of Section 3-B of the ALPA/TWA collective bargaining agreement, ALPA has sent to TWA certifications of agency shop delinquency under Section 3-B(c) for eight TWA pilots. Subsequent to mailing of the 3-B(c) notice, but prior to discharge, six of these pilots requested from ALPA and were allowed an extension of time, within which to cure their service charge delinquency. All of these pilots then paid the requested amount, and were not discharged from TWA. The remaining two pilots were discharged. One of the two discharged pilots is Plaintiff and the other is James L. Stevens.

Dated June , 1981.

CHARLES C. CALDART
MILES, WAY & CALDART
Attorney for Plaintiff

Dates June 6, 1981

DANIEL S. KOZMA
AIR LINE PILOTS ASSOCIATION, INT'L
1625 Massachusetts Avenue, N. W.
Washington, D. C. 20036
Attorney for Defendant

AIR-LINE PILOTS ASSOCIATION
1625 Massachusetts Ave., N.W. ☐ Washington, D.C. 20036
(202) 347-2211

October 4, 1972
#29118 TWA #2

Mr. J. Dean
326 E. 30th Street
Kansas City, Missouri 64108

Dear Mr. Dean:

We wish to acknowledge your letter of September 20, 1972 advising the Association that you wish to resign from membership.

Recognizing the seriousness of an action such as you contemplate, the Board of Directors in 1950 adopted a policy requiring Local Council Investigation into the factors behind such decision to resign.

We are, therefore, taking the libery of holding up the processing of your resignation until such time as we are able to secure the complete facts in the matter.

We feel that resignation from the Association is a most serious step for any individual pilot. Every effort is being made to build and maintain this Association as a responsible spokesman from the air line piloting profession. Since you evidently intend to remain a member of that profession, we feel you should be interested in the future of this Association.

Your Local Council Officers will be contacting you shortly. In the meantime, we know you will give serious thought to reconsidering this proposed action.

Sincerely,

LaVoy T. Jones, Director
Membership Services Department

By: _____
Air Line Analyst

LTJ:sdm
cc:

[AGREED EXHIBIT 3]

AIR-LINE PILOTS ASSOCIATION
1625 Massachusetts Ave., N.W. ☐ Washington, D.C. 20036
(202) 347-2211

November 14, 1975

TO ALL TWA PILOTS

Gentlemen:

The Agency Shop provision in our new contract becomes effective on 1 January, 1976. While it will have no effect on the vast majority of TWA Pilots, its salient features may be of interest. Beginning on 1 Jan. '76, dues for members at the current rate of 1.35% of "W-2 earnings", or a service charge for representational benefits for non-members at the same rate, must be kept on a current basis as a condition of continued employment for all TWA Pilots on our seniority list. The only exceptions are the few management pilots at, or above, the level of Assistant General Manager-Flying.

The pertinent Section 3B, Agency Shop, reads in part:

"... Each regularly assigned pilot of the Company covered by the Agreement ... shall be required as a condition of continued employment ... to pay or tender to the duly designated official of the Association ... a service charge ...

If the pilot remains delinquent by reason of failure to pay the required sum ... the Staff Vice-President-Labor Relations of the Company or designee shall thereupon take proper steps to discharge such pilot from the service of the Company."

There are three methods available for paying dues. These options will also be available to non-members for payment of their service charge.

A. *Monthly Payroll Deduction*, from the "25th paycheck". Forms for this purpose will be available at Domicile ALPA Field Offices. We urge those of you desiring to use this option to do so at once to insure that it will be effective for the January 25th paycheck. You can, of course, change options, but allow for the time lag. Those already enrolled in this option need not do anything, including any further reading.

B. *Annual in Advance.* All pilots will receive a statement from ALPA listing your charges for the coming year (Dues, Insurance, Assessments; whatever applies). Zeros will be in the "Dues" box for those already on Payroll Deduction. New applicants for payroll deduction (both members and non-members) should so note on the statement and return to ALPA. A finance charge of 1% per month will be added to any balance remaining AFTER the close of January; thus any or all listed obligations can be paid without incurring a finance charge.

C. ***Monthly Payments.*** **The minimum payment listed on the statements sent monthly can be paid each month, including any additional amounts you wish to make at any**

time. The 1% finance charge levied on the balances that remain at month's end, after all payments *received* have been credited, amounts to an effective rate of 0.85% per month, or 10.15% per year. Obviously, the faster you reduce the balances, the less you will pay for finance charges, and the effect will be greatest at the beginning of the year when the balances are highest. Option *A*, above, offers the most convenience at no additional cost.

Attendance, participation at ALPA meetings, and the right to vote, remain a privilege for members only. In fact, most ALPA services (communications, insurance programs, TWA & ALPA Mutual Aid, etc.) will not be available to non-members. However, any and all non-members can become members in good standing, with all of the rights and privileges thereof, following MEC approval, and approval of an "Arrangement Plan" with ALPA. This plan provides for small monthly payments over a long term for repayment of prior outstanding obligations. Payments and term are related to amount owed.

Ask your Council Chairman or write to the Sec./Treas. at the Manhattan, New York ALPA office for details of your plan. this is a painless way to quickly become a member in good standing.

Fraternally,

Robert C. Sherman, Sec./Treas.
TWA Master Executive Council

RCS:aw

Att:(2)

[AGREED EXHIBIT 11]

AIR-LINE PILOTS ASSOCIATION
1625 Massachusetts Ave., N.W. ☐ Washington, D.C. 20036
(202) 347-2211

December 19, 1975

TO NON-ALPA MEMBERS ON THE
TWA PILOTS' SENIORITY LIST

Gentlemen:

An Agency Shop provision in our new contract becomes effective on January 1, 1976. Beginning on that date, you will become liable for a charge of 1.35% of your "W-2 earnings". Payment of this representational charge must be kept current by one of three options, as a condition of continued employment.

Ther pertinent Section, 3B, Agency Shop, reads in part:

> "... Each regularly assigned pilot of the Company covered by the Agreement ... shall be required as a condition of continued employment . . . to pay or tender to the duly designated official of the Association ... a service charge ...
>
> If the pilot remains delinquent by reason of failure to pay the required sum ... the Staff Vice-President-Labor Relations of the Company or designee shall thereupon take proper steps to discharge such pilot from the service of the Company."

Excepted are a few pilots at, or above, the title of "Assistant General Manager Flying".

The three options available to you are the same three available to members for their dues:

A. *Monthly Payroll Deduction*, from the "25th" paycheck. Two forms for this purpose are enclosed. Return both forms with the billing notice to ALPA-DCA.

B. *Annual in Advance.* Return the enclosed billing form to ALPA with a check for the total listed.

C. *ALPA Monthly Finance Plan.* You may remit monthly by paying at least the minimum amount listed. A finance charge of 1% is added to the balance remaining AFTER the monthly closing date. This charge is equivalent to .84% on the unpaid balances, or 10.15% per annum. Paying more than the minimum will result in a lesser finance charge. After the close of each year, total dues paid is checked against 1.35% of your reported earnings. Any difference will be refunded or billed, as the case may be. Please refer questions to your Local Council Officers, or the undersigned.

Fraternally,

Robert C. Sherman, Sec./Treas.
TWA Master Executive Council

RCS:aw
Encl.

[AGREED EXHIBIT 12]

Air Line Pilots Assc.
1625 Mass. Ave. N.W.
W.D.C. 20036

Gentlemen:

Enclosed is my monthly dole as required by paragraph 3B of the agreement with TWA and ALPA.

I received your letter from John J. Magee dated 17 February 1976 in response to my letter of 22 January 1976 (misdated 22 December), but your attachment mentioned was not enclosed. I call to your attention that 3B(B) of the TWA-ALPA agreement calls for a service charge "for the administration of the agreement . . ." to be payable on the 15th of each month and does not authorize any forms of interest charge that I have objected to and refuse to pay. In addition 367 USC 704 (1961) IAM vs Street and 373 vs 113 (1963) BRAC vs Allen concluded that only charges to administer a contract could be forced upon honest citizenry by opressive Labor Unions.

John L. Dean (From handwritten)

[AGREED EXHIBIT 15]

AIR-LINE PILOTS ASSOCIATION
1625 Massachusetts Ave., N.W. ☐ Washington, D.C. 20036
(202) 347-2211

March 31, 1976

Mr. John L. Dean
326 East 30th Street
Kansas City, Missouri 64108

Dear Mr. Dean:

Your March 15 letter requests ALPA to reduce the service charge imposed upon you so as to exclude collection of sums used for political contributions, bribes, and other "illegal activities". No portion of any sums collected by ALPA as dues or service charges are used to make political campaign contributions, or for any unlawful purposes. We have discussed the Supreme Court cases mentioned in your letter with legal counsel and are advised that those decisions do not require any alteration in your service charge, or in the explanation of its method of billing previously afforded you by letter dated February 17, 1976.

Sincerely,

John J. Magee, Treasurer

JJM:clc

[AGREED EXHIBIT 16]

AIR-LINE PILOTS ASSOCIATION
1625 Massachusetts Ave., N.W. ☐ Washington, D.C. 20036
(202) 347-2211

Mr. John L. Dean
1910 Evergreen Park Drive, SW
Olympia, WA 98502

Dear Mr. Dean:

I am replying to your letter of April 15, 1977, regarding,

among others, your request for an accounting of your share of "TWA's contract negotiation and related costs." As I previously indicated to you in my letter of February 17, 1976, "agency shop is a concept which the Supreme Court of the United States has approved as a legitimate and constitutional method to compel all members in a represented group, whether they are members of the representing union, to participate *equally* in financial support of the union's functions." Consequently, the Association does not allocate collective bargaining and contract administration according to the particular services provided to one pilot or another, but rather apportions the cost equally to all members and non-members employed by carriers which have working agreements with the Association.

As to your concern about the release by TWA to the Association of information pertaining to your income for 1976, this procedure is authorized by the same provisions of the Railway Labor Act which provide the authority for the agency shop. In the absence of a dues check-off agreed to by the non-member, the company and the Association must be able to fulfill the terms of the agency shop provisions in the contract in some other way so as to assure the quality of apportionment of the service charge. The company, therefore, provides us with this information in order that we may adjust the service charge billing estimate to reflect your actual income in the prior year. I am advised by counsel that this agreement is not in violation of your Constitutional or statutory rights.

In conclusion, I wish to advise you that you are seriously in arrears in the payment of your 1976-1977 service charges. Your adjusted service charge for 1976 amounted to $507.79. To date, you have only paid $376.50 toward that charge. Your estimated 1977 service charge is also currently delinquent. You will be receiving your next service charge bill in May. I would urge you remit the amount which you owe to the Association at that time. In the event you do not, I will have no choice but to invoke the provisions of

Section 3-B(B), of the agreement between TWA and ALPA subjecting you to discharge from your employment.

Sincerely,

John J. Magee, Treasurer **[AGREED EXHIBIT 78]**

AIR-LINE PILOTS ASSOCIATION
1625 Massachusetts Ave., N.W. ☐ Washington, D.C. 20036
(202) 347-2211

July 29, 1977

Mr. J. C. Hilly
TWA Vice President — Labor Relations
605 3rd Avenue
New York, NY 10016

Dear Mr. Hilly:

In accordance with the terms of the Agreement between Trans World Airlines and Airmen in the service of Trans World Airlines as represented by the Air Line Pilots Association, International, Section 3 (Agency Shop), the following employee of Trans World Airlines is herby certified to be delinquent in the payment of his service charge to the Association, has been notified of such delinquency and has failed to remit payment within the grace period allowed:

J.L. Dean
1910 Evergreen Park Dr., SW
Olympia, WA 98502

Under the terms of Section 3, Paragraph B of the above Agreement, I request that you proceed with the proper steps to discharge this employee. Please inform me as to the final disposition of this case.

Sincerely,

John J. Magee, Treasurer

JJM:eab

cc: J. P. Donlan, Jr.
V. N. Jones
R. C. Sherman
J. L. Dean

[AGREED EXHIBIT 82]

SECTION 3-B

AGENCY SHOP

(A) Service Charge Liability

Each regularly assigned pilot of the Company covered by the Agreement who fails voluntarily to acquire or maintain membership in the Air Line Pilots Association, shall be required as a condition of continued employment, beginning sixty (60) days after such employment, to pay or tender, to the duly designated official of the Association for each following full calendar month as a regularly assigned pilot, a service charge as a contribution for the administration of the Agreement and representation of such pilot. The service charge for the first month and for each month thereafter shall be in an amount equal to the Association's regular and usual monthly dues uniformly required of the members of the Association. Except as provided in Section 3-C, payment shall be made on the fif-

teenth day of the month for which such service charge is payable. For the purposes of this Section 3-B, a regularly assigned pilot of the Company shall include a Training Captain regularly assigned to a domicile but shall not mean pilots assigned to a Management Position.

(B) Delinquency

If a pilot of the Company who is required by the provisions of Paragraph (A) above to pay the service charge therein specifier becomes at least sixty (60) days delinquent in the payment or tender of such service charge, the Treasurer of the Association shall notify such pilot by registered mail, return receipt requested, copy to the Vice President-Labor Relations, of the Company or his successor or designee, that he is delinquent in the payment of such service charge and is subject to discharge as an employee of the Company. Such notice shall also inform the pilot that he must remit or tender the required payment to the Treasurer of the Association within a period of fifteen (15) days after receipt by him of the notice herein referred to or be discharged.

(C) Certification of Delinquency

If, upon the expiration of the fifteen (15) day period after receipt by him of the notice referred to in Paragraph (B) above, the pilot remains delinquent by reason of failure to pay or tender the required sum, the Treasurer of the Association shall certify in writing to the Vice President-Labor Relations, of the Company or his successor or designee, copy to the pilot, both by registered mail, return receipt requested, that the pilot has failed to make or tender payment within the allowed period and is therefore to be discharged. The Vice President-Labor Relations, of the Company or his successor or designee, shall thereupon take proper steps to discharge such pilot from the service of the Company. Termination shall be effective ten (10) days after receipt by the Company of the notice provided for herein.

(D) Protest Procedure

A Protest by a pilot whose discharge is requested by the Association as a result of an interpretation or application of Section 3-B shall be limited to the following procedure:

(1) A pilot who believes that the provisions of Section 3-B have not been properly interpreted or applied, as they pertain to him, may submit his request for review in writing within five (5) days from the date of receipt of notice by him in the form of his copy of notice to the Company with respect to him as provided in Paragraph (C). Such request must be submitted to the Vice President-Labor Relations of the Company or his successor or designee who will review the protest and render a decision in writing with respect thereto not later than five (5) days following the receipt of the request of review.

(2) The Vice President-Labor Relations of the Company or his successor or designee, shall forwrd his decision to the pilot with a copy to the official of the Association who shall promptly be designated in writing by the Association for this purpose. Said decision shall be final and binding on all interested parties unless appealed as hereinafter provided. If the decision is not satisfactory to either the pilot or the Treasurer of the Association, either may appeal the decision by filing a notice of appeal. Such notice shall be sent to the Company, to the other party and to the National Mediation Board within ten (10) days of the receipt of the decision and must contain a request for the National Mediation Board to provide a list of five (5) neutral referees. A neutral referee may be agreed upon by the pilot and the Association within ten (10) days after receipt of the list of neutral referees.

If the parties cannot agree on a neutral referee, a referee will be chosen from the panel supplied by

the National Mediation Board. The alternate strike method shall be used to select a neutral referee with the pilot initiating the first rejection. Such final selection of a neutral referee shall be accomplished within ten (10) days after receipt of the list of neutral referees. If the parties have not reached agreement by the alternate strike method within the aforementioned ten (10) day period, the first name listed on the five (5) name panel provided by the National Mediation Board shall be designated the neutral referee.

(3) The decision of the neutral referee shall be requested within thirty (30) days after the hearing of the appeal unless otherwise agreed by the pilot and the Association and shall be final and binding on all parties to the dispute. The fees, charges and other reasonable expenses of such neutral referee shall be borne equally by the pilot and the Association.

(E) Status Pending Appeal

During the period in which a protest is being handled under the provisions of Section 3-B and until final decision by the Vice President-Labor Relations, or his successor or designee, the pilot shall not be discharged from the Company nor lose any seniority or other rights under the Agreement solely for the reason of noncompliance with the terms and provisions of Section 3-B.

(F) Discharge

A pilot discharged by the Company under the provisions of this Section shall be deemed to have been "discharged for cause" within the meaning of the terms and provisions of this Section.

(G) Indemnification

The Association agrees that it shall indemnify the Com-

pany and save the Company harmless from any and all claims, awards or judgments (including court costs) awarded to an employee or employees against the Company by virtue of the misinterpretation or misapplication of any of the terms of Section 3-B.

(H) Discharge Delay

Other provisions of Section 3-B to the contrary notwithstanding, the Company shall not be required to terminate the employment of any pilot until such time as the services of a qualified replacement areavailable, provided that in the judgment of the Company such replacement is currently required for the orderly continuation of the Company's operation. The determination of whether a qualified replacement is available shall be the exclusive responsibility of the Company. The Company may not, however, retain any pilot in the service under the provisions of this paragraph for a period of more than four (4) months from the date of the final decision in this case.

CONSTITUTIONAL PROVISIONS

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same office to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

FEDERAL STATUTES

Title 28 USC § 1254.
Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted on the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

Title 45 U.S.C. § 152, Eleventh.

Eleventh. Union security agreements; check-off. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or

any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted –

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership,

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership, Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, first (h) of this act [45 USCS § 153(h), First division] defining the jurisdictional scope of the first division of the National

Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs fourth and fifth of section 2 of this act [this section] in conflict herewith are to the extent of such conflict amended.

(May 20, 1926, ch 347, Title I, § 2, in part, 44 Stat. 577; June 21, 1934, ch 691, § 2, in part, 48 Stat. 1186; Apr. 10, 1936, ch 166, 49 Stat. 1189; Jan. 10, 1951, ch 1220, 64 Stat. 1238.)

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ALEXANDER L. STEVAS,
CLERK

No. 83-562

IN THE

Supreme Court of the United States

October Term, 1983

JOHN DEAN, Petitioner

v.

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, Respondents

BRIEF OF TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Did the court of appeals err in its holding that an employee obligated to pay agency fees in lieu of union dues could not unilaterally reduce his payments, even though he believed the union was making political expenditures to which he objected?

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No. 83-562

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

JOHN DEAN, Petitioner

v.

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, Respondents

BRIEF OF TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Trans World Airline, Inc. respectfully requests that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at Dean v. Trans World Airlines, Inc., 708 F.2d 486 (9th Cir.

June 16, 1983), and is reproduced at pages 2-4 of the Appendix to the Petition for Writ of Certiorari. The court of appeals' Order rejecting the petitioner's suggestion for en banc rehearing, entered on August 25, 1983, is unreported and is reproduced at page 1 of the Appendix to the Petition.

JURISDICTION

This Court does not have jurisdiction to review this case on a writ of certiorari, because the Petition for Writ of Certiorari was not filed within the time limits required by 28 U.S.C. § 2101(c), as explained in the Argument at 9-12 infra.

APPLICABLE STATUTES AND RULES

The applicable statutes and procedural rules are set forth in Appendix C to Trans World Airlines, Inc.'s Brief in Opposition.

STATEMENT OF THE CASE

In 1975 Trans World Airlines, Inc. ("TWA")[1] and Air Line Pilots Association, International ("ALPA") signed a collective bargaining agreement containing an agency shop provision (Pet. at A-11).[2] The agency shop provision required TWA pilots who did not join the union to pay ALPA a service charge in an amount equal to union dues as a condition of continuing employment (Exhibit 82, Pet. at A-41). Throughout 1976 petitioner Dean, a TWA pilot at the time, demanded a reduction in these charges, based upon his belief that ALPA

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[1] In compliance with Supreme Court Rule 28.1, TWA discloses that its parent company, Trans World Corporation, owns 80% of TWA stock. The remaining 20% is publicly traded, but no other stockholder owns more than 10% of the total shares outstanding.

[2] "Pet. at A" refers to the Appendix to the Petition for Writ of Certiorari.

was making expenditures not directly related to the TWA-ALPA collective bargaining agreement. ALPA denied that it was making expenditures for political contributions or unlawful purposes, and therefore refused to reduce the amount of Dean's agency service charge (Exhibit 15, Pet. at A-37-38).

In January of 1977, the petitioner began to pay approximately 25% of his monthly agency fee, a percentage Dean arbitrarily determined to be the amount ALPA could legitimately bill him. Dean continued to pay only 25% of his service charge through June of 1977 (Pet. at A-7). ALPA then notified Dean that he was delinquent in his agency fees, and advised him that if the delinquency was not cured Dean would be discharged (Pet. at A-38-39). Because the delinquency was not cured in a timely manner, ALPA

requested that TWA discharge Dean pursuant to Section 3-B of the collective bargaining agreement (Exhibit 78, Pet. at A-40-41). TWA complied and Dean's employment was terminated on August 12, 1977 (Pet. at A-3).

Dean filed an action in the District Court for the Western District of Washington seeking back pay and reinstatement and alleging violations of the Railway Labor Act, 45 U.S.C. § 152, Eleventh and 45 U.S.C. § 181. Dean alleged that ALPA had breached its duty of fair representation and TWA had breached the collective bargaining agreement by discharging him for nonpayment of his agency fees (Pet. at A-5). The district court granted summary judgment in favor of Dean on the issue of liability, holding that by seeking Dean's discharge for nonpayment of agency fees, ALPA had breached

its duty of fair representation. The district court then held that because ALPA had wrongfully sought Dean's discharge, TWA was also liable to Dean for breach of the collective bargaining agreement. The district court therefore issued a permanent injunction ordering Dean's immediate reinstatement (Pet. at A-8, 9, 17).

The United States Court of Appeals for the Ninth Circuit reversed, holding that the district court had erred in granting summary judgment because Dean remained obligated under the agency-shop agreement, and therefore could not unilaterally reduce his fee payments (Pet. at A-4). The court of appeals remanded the case to the district court for trial of the remaining issues (Pet. at A-4). The judgment of the court of appeals was entered on June 16, 1983. Dean filed a Motion for En Banc Rehearing (App. at

A-3), which was denied on August 25, 1983 (App.[3] at A-1).[4] Dean filed a Petition for Writ of Certiorari on October 1, 1983.[5]

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should not be granted for the following three reasons.

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[3]"App" refers to the Appendix to the TWA's Brief in Opposition to the Petition for a Writ of Certiorari.

[4]Dean asserts in the Petition that his "motion for rehearing and suggestion for rehearing en banc" were denied by the court of appeals. See "Jurisdiction," Pet. at v. However, the Order of the court of appeals makes clear that only a suggestion for rehearing en banc was considered and denied, and that no petition for rehearing was filed. See Order, App. at A-1-2.

[5]TWA was not served with copies of the Petition for Writ of Certiorari before filing, as is required by Sup. Ct. R. 19.3. In fact, copies of the Petition were sent only after counsel for TWA requested copies from petitioner's attorney. The petitioner also failed to notify TWA of either the date of filing or the docketing number of his Petition, as is required by Sup. Ct. R. 19.3.

First, this Court lacks jurisdiction to hear the case because the Petition was not timely filed.

Second, the Petition presents no important federal question which this Court should determine. No constitutional issue was either raised or addressed in the courts below, and thus the constitutional issues raised in the Petition for Writ of Certiorari should not be considered by this Court at the present time. The issue actually decided by the court of appeals has already been addressed by this Court in prior decisions. Because the holding of the Ninth Circuit follows those decisions, it need not be reviewed on certiorari.

Third, the alleged conflict, which petitioner has not demonstrated, is irrelevant to the determination of any issue before this Court. Thus, this

Court need not grant the writ of certiorari to resolve a conflict among the circuits.

ARGUMENT

I. The Supreme Court Lacks Jurisdiction Because the Petition for Writ of Certiorari Was Not Timely Filed.

Section 2101(c) of Title 28 of the U.S. Code requires that a petition for certiorari in a civil action be filed within 90 days of the time judgment is entered.[6] This Court has held that it has no jurisdiction to consider a petition for certiorari brought pursuant to 28 USC § 2101(c) which is not timely filed. Department of Banking v. Pink, 317 U.S. 264, 268 (1942); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923). Also, Supreme Court

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[6]Dean erroneously asserts that a 60-day period applies to his Petition for Writ of Certiorari. See "Jurisdiction," Pet. at v.

Rule 20.3 states that a petition which is jurisdictionally out of time will not be received.

In this case, the applicable 90-day period began running upon entry of the judgment of the court of appeals, because no petition for rehearing was filed. Supreme Court Rule 20.4 states that the time for filing a petition for certiorari runs from the date judgment is entered unless "a petition for rehearing is timely filed." Dean asserts that the 90-day period began to run on August 25, 1983, the date of the Ninth Circuit's order denying his suggestion for en banc rehearing (Pet. at v). However, a suggestion for en banc rehearing does not affect the finality of an appellate court judgment and thereby cause the 90-day period to begin to run anew. Rule 35 of the Federal Rules of Appellate Procedure

specifically differentiates between a petition for rehearing and a suggestion for rehearing en banc, and states that a suggestion for rehearing en banc does not affect the finality of a judgment of a court of appeals. While Dean asserts that a motion for rehearing[7] was denied, the Ninth Circuit's order denying en banc rehearing leaves no doubt that a suggestion for en banc rehearing was received and denied and that no petition for rehearing was filed. See Order (Pet. at A-1). Even if Dean believed he had filed a petition for rehearing, and thus caused the 90-day

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[7]The petitioner filed what he styled a "motion for en banc rehearing." App. at A-3. The court of appeals determined that the motion was a "suggestion for rehearing en banc." See Order, App. at A-1. Compare Fed. R. App. P. 35 with Fed. R. App. P. 40.

period to begin to run anew, he was on notice that this belief was incorrect from August 25, 1983, the date of the denial of the en banc rehearing. Because the 90-day period did not expire until September 14, 1983, Dean had ample opportunity to either file a timely petition or request an extension of time. He did neither.

The 90-day period for timely filing in this case began to run on the date the Court of Appeals for the Ninth Circuit entered its judgment, June 16, 1983. Dean's Petition for a Writ of Certiorari was filed on October 1, 1983, 107 days after entry of that judgment and not within the 90-day period established by § 2101(c). This Court should therefore dismiss the petition for lack of jurisdiction.

II. The Petition For Writ of Certiorari Should Be Denied Because No Important Federal Question Has Been Presented.

A. The Alleged Violation of Petitioner's Constitutional Rights Was Neither Raised Nor Addressed in the Court of Appeals

In order to review and decide questions on a writ of certiorari, this Court has required that such questions be raised in and addressed by the court whose judgment is being reviewed. Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981); Miree v. De Kalb County, 433 U.S. 25 (1977). Although Dean's Petition for Writ of Certiorari raises the question whether Dean's First and Fifth Amendment rights were violated by the respondents' actions, this question was neither raised nor addressed in the court of appeals. (See Pet. at

A-2-4).[8] Therefore, this Court should refuse to grant a writ of certiorari to review the constitutional issues presented in Dean's Petition.

B. The Issue Actually Decided by the Court of Appeals Has Already Been Addressed By This Court

The court of appeals ruled that the district court erred in granting summary judgment in favor of Dean because Dean "did not pursue the proper avenue of redress for his grievance." (Pet. at A-4). The court of appeals held that when an employee who is obligated to pay

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[8]Nor was this issue raised or addressed in the district court. See Order Granting Plaintiff's Motion for Partial Summary Judgment, Pet. at A-5; Findings of Fact and Conclusions of Law, id. at A-11; Order on Motion for Permanent Injunction, id. at A-14. For this reason it would be inappropriate to remand the case to the court of appeals for decision on the constitutional issue. See J. Truett Payne Co. Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981).

a fee to a union under an agency-shop agreement objects to expenditures by the union, he may not unilaterally reduce or stop his fee payments. Instead he must pursue judicial relief through an action seeking either a rebate for political and ideological expenditures or a narrowly drawn injunction prohibiting the use of a portion of his fees for political and ideological expenditures. Id. Because Dean had not sought judicial relief by either of those two methods, but had unilaterally reduced the payments due under the agency-shop agreement, the court of appeals ruled that the district court could not grant summary judgment holding ALPA and TWA liable for the unlawful discharge of Dean. Id.

That ruling presents no important question that this Court must answer,

because this Court has already determined what remedies a dissenting employee, such as Dean, may pursue. This Court first held that a union may not expend dues for political and ideological purposes to which an employee voices objection in International Association of Machinists v. Street, 367 U.S. 740 (1961). However, in Street this Court delineated the two remedies available to protesting employees: to seek either a rebate for political and ideological expenditures or an injunction prohibiting the expenditure of a portion of the dues for political and ideological purposes. Id. at 774-75. This Court held that protesting employees should not be permitted to take alternative action such as withholding payment of dues because this would interfere too greatly

with legitimate union functions. Id. at 771. Thus, the Court stated:

> ...[protesting employees] therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement.

Id.

This Court reiterated the two remedies available to protesting union members in Brotherhood of Railway and Steamship Clerks v. Allen, and again held that protesting employees were not released from their dues-paying obligations, stating that such employees "can be entitled to no relief until final judgment in their favor is entered." 373 U.S. 113, 120 (1963). Finally, in the case of Abood v. Detroit Board of Education, 431 U.S. 209 (1976), this Court found that the same two remedies were appropriate for dissenting employees not members of the union, but

obligated to pay fees under an agency-shop agreement. Id. at 242.

Dean's contention that the court of appeals erred in holding that Dean was not entitled to unilaterally reduce his agency fee payments is simply not a contention that merits this Court's review on certiorari, because the issue has been resolved in previous cases.

III. The Petition for Writ of Certiorari Should Be Denied Because The Alleged Conflict in the Circuits Has Not Been Demonstrated and is Immaterial to the Question Presented for Certiorari.

Dean alleges that there is a conflict among the circuits in that some circuit courts recognize a distinction between agency-shop and union-shop arrangements, while other circuit courts do not (Pet. at 4). However, the petitioner has not demonstrated that such a conflict actually exists. The only two

circuit court decisions cited by the petitioner for this proposition are the Ninth Circuit's opinion in the instant case and the District of Columbia Circuit's opinion in International Union, Etc. v. NLRB, 675 F.2d 1257 (D.C.Cir. 1982), cert. denied, 103 S. Ct. 816 (1983). To establish the conflict, the petitioner has quoted a passage from International Union referring to differences between membership dues and representation fees (Pet. at 4). However, the petitioner has failed to note that this quotation is from the dissenting opinion. See 675 F.2d at 1279 (Mikva, J., dissenting). The holding in the majority opinion does not stand for the proposition that there is a distinction between representation fees and union dues. See 675 F.2d 1257 (holding that because representation fee assess-

ments on non-union employees are banned by right-to-work laws, they are not mandatory subjects of bargaining; thus insistence upon them by the union amounts to an unfair labor practice). As no other case has been cited to show a conflict with the Ninth Circuit's opinion, no conflict has been demonstrated.

More importantly, whether there is a distinction between fees paid under an agency-shop agreement and dues paid under a union-shop agreement is irrelevant to the determination of the question presented to this Court by the Petition for Writ of Certiorari. This Court has recognized that the rationale underlying its limitation on remedies for union members protesting expenditure of dues mandates the same limitation on remedies for non-union members protesting expenditure of agency representation

fees. See Abood, 431 U.S. at 237-238. The same damage to union stability would result if non-union members could unilaterally withhold representation fees as results when union members withhold dues. This Court specifically addressed this issue in Abood where it held that only remedies which do not restrict ". . . the Union's ability to require every employee to contribute to the cost of collective bargaining activities," such as the two limited remedies delineated in Street and Allen, should be available to protesting non-union employees obligated to pay agency fees. Id. at 237-42.

The only issue decided by the court below was that Dean was not entitled to summary judgment because he had not pursued the correct remedies, but had unilaterally reduced his agency fee pay-

ments. Because the alleged conflict in the circuits as to whether there is a distinction between agency fees and union dues is irrelevant to the correct determination of that issue, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated above, respondent TWA respectfully requests that the Petition for Writ of Certiorari be denied.

DATED October 28, 1983.

Respectfully Submitted,

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APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DEAN,	)	No. 82-3133
Plaintiff-Appellee,	)	D.C. # C78-439M
vs.	)	ORDER
TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
Defendants-Appellants.	)	

Before: BROWNING, Chief Judge, FLETCHER and POOLE, Circuit Judges.

The panel as constituted in the above-entitled case has voted to reject the suggestion for rehearing en banc. No petition for rehearing was requested.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a

vote on the suggestion. Fed. R. App. P. 35(b).

The suggestion or rehearing en banc is rejected.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DEAN, Plaintiff-Appellee, vs. TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association, Defendants-Appellants.	)	No. 82-3133 APPELLEE'S MOTION FOR EN BANC REHEARING

COMES NOW the appellee, JOHN DEAN, by and through his attorney of record, L. S. EDMONDSON, and moves the court for an en banc rehearing of this case.

An en banc rehearing is necessary because two decisions of this court, Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970) and Seay vs. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. 1976), were not considered and

were effectively overruled without discussion by the court's opinion.

Respectfully submitted,

/s/

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APPENDIX C

28 U.S.C. § 2102(c)

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

45 U.S.C. § 181

All of the provisions of sections 151 to 152 and 154 to 163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every

carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

SUPREME COURT RULE 19.3

Counsel for the petitioner shall enter an appearance, pay the docket fee, and file, with proof of service as provided by Rule 28, 40 copies of a petition which shall comply in all respects with Rule 21. The case then will be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the Clerk, of the date

of filing and of the docket number of the case. Such notice shall be served as required by Rule 28.

SUPREME COURT RULE 20

.1 A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

.2 A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

.3 The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4 The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

.5 A cross-petition for writ of certiorari shall be deemed in time when it is fled as provided in paragraphs .1,

.2, and.4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

.6 An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 21.1, subparagraphs (e) and (h)), the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42, and 43. Such applications are not favored.

SUPREME COURT RULE 28.1

Pleadings, motions, notices, briefs, or other documents or papers required or permitted to be presented to this Court or to a Justice shall be filed with the Clerk. Any document filed by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance. Any document, except a joint appendix or a brief amicus curiae, filed by or on behalf of one or more corporations, shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation. This listing may be done in a footnote. If such listing has been included in a document filed earlier in the particular case, reference may be made to the earlier document and only

amendments to the listing to make it currently accurate need to be included in the document currently being filed.

FEDERAL RULE OF APPELLATE PROCEDURE 35

Rule 35. Determination of Causes by the Court in Banc.

(a) WHEN HEARING OR REHEARING IN BANC WILL BE ORDERED. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) SUGGESTION OF A PARTY FOR HEARING OR REHEARING IN BANC. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) TIME FOR SUGGESTION OF A PARTY FOR HEARING OR REHEARING IN BANC; SUGGESTION DOES NOT STAY MANDATE. If a party desires to suggest that an appeal be heard initially in banc, the sugges-

tion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

FEDERAL RULE OF APPELLATE PROCEDURE 40

Rule 40. Petition for Rehearing.

(a) TIME FOR FILING; CONTENT; ANSWER; ACTION BY COURT IF GRANTED. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition

shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) FORM OF PETITION; LENGTH. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by a local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

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No. 83-562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN DEAN,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-562

JOHN DEAN,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Dean, a pilot employed by Trans World Airlines, Inc. ("TWA"), was required by virtue of the applicable collective bargaining agreement to join the union representing TWA's pilots and pay its customary dues or, in the alternative, to remain a nonmember and pay a service charge to the union in an amount equal to such dues. A.6; 20, ¶ 5; 41.[1]

[1] "A." references are to the decisions of the district court and the court of appeals, and to related materials, reprinted in an Appendix to the Petition.

Dean wrote numerous letters to the union—the Respondent Air Lines Pilots Association, International ("ALPA")—protesting the service charge obligation, characterizing it as an "unconstitutional tax," and disputing ALPA's authority to impose it. A. 2-3, 20-21. Among other things, Dean asserted in a March 15, 1976, letter that the law prevented ALPA from spending money for "bribes, political contributions, mafia payoffs, etc."; in this letter, Dean also cited the Supreme Court's decisions in *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961) and *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963). A. 2-3.[2] ALPA's Treasurer responded in writing to all of Dean's protests, but declined to make any adjustment in Dean's service charge (A. 6; 20-21), explaining that ALPA did not spend any union funds for "political campaign contributions, or for any unlawful purposes." A. 38.

Thereafter, Dean refused to pay the union's monthly service charge billings in full. In January 1977, although his monthly obligation was calculated by ALPA to be $40.00, Dean paid only $10.00. For each of the next five months, Dean continued to pay only $10.00 per month, an amount selected unilaterally by him. A. 3; 7. When Dean failed to take any steps to cure his growing delinquency, despite repeated written notices and warnings from ALPA (A. 3; 38-39), his discharge was requested in July 1977 by ALPA and implemented by TWA the following month. A. 3.

Before the district court, Dean argued, among other things, that his discharge was unlawful by virtue of the

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[2] At A. 37, Petitioner has printed only a portion of Dean's 1976 letter; the text of the entire letter appears, *infra*, as an Appendix to this Brief.

decision in *Street, supra.* Having made a proper *Street* objection in 1976, he contended, and receiving no reduction in his service charge, he was entitled to reduce his payments unilaterally without becoming subject to discharge under the agency shop provisions of the TWA-ALPA agreement. ALPA contended that Dean's correspondence, properly interpreted, did not appear to raise a genuine *Street* objection; moreover, ALPA asserted, the *Street* case and its progeny gave employees no right to make unilateral reductions in their monetary obligations and no protection against enforcement of the bargaining agreement if they persisted in delinquency.

The district court granted Dean's motion for partial summary judgment without determining whether or not Dean had actually been compelled by ALPA to sponsor political activities or other activities not germane to collective bargaining. In the district court's view, the question whether Dean "was or was not delinquent is not material." A. 8.[3] By "refusing Dean's request for an adjustment, ALPA has breached its duty . . . [and Dean's] discharge . . . was unlawful as a matter of law. . ." A. 9.

Thereafter, the district court entered a permanent injunction (A. 14-17) compelling ALPA and TWA to reinstate Dean. ALPA and TWA appealed pursuant to 28 U.S.C. § 1292(a) and the U.S. Court of Appeals for the Ninth Circuit reversed.

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[3] The district court did state, incorrectly, that "ALPA concedes that at all times material, it spent money for purposes other than collective bargaining." A. 8. In fact, ALPA had stipulated only that it spent union funds for a variety of purposes—including contract negotiations, grievance processing, member recruitment, and defense and prosecution of litigation related to bargaining agreements—but did not concede that any of such purposes were unrelated to collective bargaining. A. 24-25.

Relying upon the explicit language of the Court's opinion in *Street, supra*, and *Allen, supra*, the court of appeals held that "protesting employees are not released from their dues-paying obligation simply because they believe that a portion of their dues is being used for political or ideological expenditures." A. 3. Since the Supreme Court had expressly prohibited the use of injunction restraining dues collection in such cases, it follows that "an individual should not be permitted unilaterally to decide to reduce or stop dues payment." A. 4. His remedy, instead, was to seek judicial relief by way of an order compelling a partial rebate of his dues or service charge, or an order enjoining the use of his dues or service charge for political expenditures. *Id.*

The case was remanded with instructions to vacate the order granting summary judgment and the injunction, and for further proceedings on unadjudicated issues.[4]

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision Of The Court Of Appeals Is Clearly Correct, And Is In Conflict With No Other Decisions

Section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, expressly permits employees and unions "to make agreements, requiring, as a condition of continued employment . . . all employees . . ." to pay their bargaining representative's customary membership dues. It is settled, however, that this enactment does not authorize unions to compel employees to sub-

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[4] Dean also argued in district court that his discharge was invalid because ALPA had failed to comply with the pre-discharge notification process established in the ALPA-TWA agency shop agreement. Neither the district court nor the court of appeals addressed this contention.

sidize union activities not germane to collective bargaining. *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). Accordingly, when a union spends exacted funds for political campaign contributions or other political or ideological objectives, dissident employees are entitled to a partial rebate from the union when they raise an appropriate objection.

Even if Dean's correspondence with ALPA were deemed to present a request for a partial rebate under *Street*, however, the court of appeals properly concluded that Dean was not thereby excused from his contractual obligations to the union. Thus, in *Street* itself, this Court made it explicit that even employees who have truly expressed objections to their union's non-germane expenditures remain obligated, nevertheless, to comply with the terms of the union-security contract; their proper remedy is to demand a rebate from the union and to sue in federal court if it is refused. In the interim, they must comply with the applicable bargaining agreement. *Street*, *supra*, at 771.

For the same reasons, this Court vacated, in *Allen*, *supra*, 373 U.S. at 119-120, a state court order enjoining enforcement of the union security contract:

> "We also held in *Street* that an injunction relieving dissenting employees of all obligation to pay the money due under an agreement authorized by Section 2, Eleventh was impermissible . . . The injunction granted [below] . . . was thus improper, even though it is subject to modification if petitioners come forward and prove the proportion of exacted funds required for purposes germane to collective bargaining. Even such a remedy we think, 'sweeps

> too broadly . . . [and] might well interfere with the . . . union's performance of [its statutory] . . . functions' It also follows from *Street* that the Superior Court erred in granting respondents interim relief against compliance with the financial obligations imposed by the Agreement . . ."[5]

The court of appeals correctly applied that doctrine here. Since the courts cannot enjoin the collection of union dues, it held, an employee cannot be permitted unilaterally to reduce or eliminate his dues obligation. The district court's contrary ruling was properly reversed because it "in essence approved Dean's self-help injunction." A. 4. Other federal courts which have considered the question have reached the same result. *Hostetler* v. *Brotherhood of Railroad Trainmen*, 287 F.2d 666, 668 (4th Cir. 1961), *cert. denied*, 368 U.S. 955; *Bagnall* v. *ALPA*, 626 F.2d 336, 340 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

Contrary to Petitioner's suggestion (Pet. 4-8), there are no conflicting decisions. The cases cited by Petitioner are plainly inapposite. Thus, *Seay* v. *McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970) simply holds that a federal district court has jurisdiction over an employee's complaint alleging union expenditures, from exacted funds, for political and ideological purposes, and that this jurisdiction is not impaired by any grant of authority to the National Labor Relations Board contained in 29 U.S.C. § 151, *et seq.* *International Union, etc.*, v. *NLRB*, 675 F.2d 1257 (D.C. Cir. 1982) is likewise distinguishable: there the question presented was whether a

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[5] In *Abood*, *supra*, the Court again emphasized that any *Street* remedies devised would be improper if they restricted the union's "ability to require every employee to contribute to the cost of collective bargaining activities." 431 U.S. at 237.

union could lawfully insist, during bargaining under the National Labor Relations Act, upon inclusion of an agency shop provision despite the fact that applicable state law prohibited such agreements.[6]

Finally, Petitioner's reliance upon *Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969) is entirely misplaced. *Glover* dealt with the question whether an employee complaint should be dismissed because he failed to exhaust his contractual remedies; in the instant case, no party contended and no court ruled that Dean was obliged to exhaust any remedies before bringing suit.

2. The Court Of Appeals' Decision Does Not Decide An Important Question Of Federal Law Which Should Be Settled By This Court.

Although the Petition asserts that Dean's constitutional rights have been violated, Pet. 8-11, this case presents no constitutional questions at all. Indeed, it was precisely to *avoid* constitutional questions that this Court, in *Street*, interpreted the Railway Labor Act's Section 2, Eleventh, narrowly and concluded that Congress did not authorize unions, over an employee's objection, to spend his money for political purposes he opposes. 367 U.S. 749-50, 767-770. If unions act in disregard of those limits, therefore, a federal court remedy is available which makes resort to constitutional questions unnecessary. Petitioner has not sought to invoke that remedy, and there is nothing in the court of appeals' decision which would limit its availability or its efficacy.

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[6] The NLRA contains an explicit provision disclaiming preemption of such state laws. 29 U.S.C. Section 164(b). See *Retail Clerks Int'l Ass'n.* v. *Schermerhorn*, 373 U.S. 746 (1963). No such disclaimer appears in the Railway Labor Act.

Nor does this case pose the question whether certain specified union expenditures should be characterized as "germane to collective bargaining" or "nongermane and political." In the view it took of the law, the court of appeals correctly found it unnecessary to reach that issue here.

Hence, although Petitioner repeatedly insists that ALPA "improperly" refused to grant him a partial rebate, Pet. 2, 5-8, the fact remains that ALPA's refusal was neither improper, nor "deceitful" (Pet. 6), nor unlawful unless Dean made a proper request for a rebate and ALPA actually spent his exacted funds for purposes not germane to collective bargaining. But ALPA contended below that neither of these conditions had been satisfied, and no disposition of these additional defenses was either required or rendered.[7]

Nor do any of the "special circumstances" identified in the Petition, at p. 7, create an issue warranting review. The fact that Dean is not a member of ALPA is quite immaterial since the agency shop arrangement itself—which by definition applies to nonmembers—is lawful and constitutional. See *NLRB* v. *General Motors Corp.*, 373 U.S. 733 (1963). The claim that Dean was required by the ALPA-TWA agreement only to pay his "proportionate share of costs incurred in collective bargaining" (Pet. 4, 7, 10) is a misstatement; the agreement itself describes the service charge as "an amount equal to the Association's regular and usual monthly dues . . ." A. 41.

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[7] As previously noted, *supra*, p. 3, n.3, the district court erroneously stated that "ALPA concedes that . . . it spent money for purposes other than collective bargaining." Petitioner does not here seek to demonstrate either that the district court's statement was accurate, or that the court of appeals erred in ignoring it.

Finally, the claim that ALPA and TWA failed to provide Dean with the notice required by the agreement (Pet. 10-11) is not properly before this Court. Neither the district court nor the court of appeals addressed the merits of this claim; ALPA has consistenly maintained that the claim is contrary to the record evidence; and Petitioner himself acknowledged in the court of appeals that there were material issues of fact which precluded summary disposition of this question. Brief for Plaintiff-Appellee, at p. 29, in *Dean* v. *Trans World Airlines, Inc. and Air Line Pilots Association, Int'l*, No. 82-3133 (9th Cir. 1983).

3. The Petition Is Untimely.

Since the judgment of the court of appeals was entered on June 16, 1983 (Pet. V), and the instant Petition was not filed until on or about October 6, 1983, the Petition was plainly filed too late, 28 U.S.C. § 2102(c), unless an extension of time was granted or "a petition for rehearing . . . [was] timely filed" in the court of appeals. Rule 20.4, Rules of the Supreme Court.

The record shows that Petitioner did not file a "petition for rehearing" within the meaning of Rule 20.4. The sole post-decision filing made by Petitioner in the court of appeals was a one-page document, reprinted in the Appendix to this Brief, *infra*, styled "Appellee's Motion for En Banc Rehearing."

This document was obviously intended to serve as suggestion for rehearing en banc pursuant to Rule 35, Federal Rules of Appellate Procedure, because the sole basis for relief consisted of an assertion that the court of appeals' decision herein was inconsistent with the court of

appeals' prior decision in *Seay, supra.*[8] Moreover, the court of appeals correctly characterized Petitioner's filing in its order entered August 25, 1983. There, the court of appeals cited Rule 35, Federal Rules of Appellate Procedure, and stated that the "suggestion for rehearing en banc is rejected . . . No petition for rehearing was requested." A.1. Neither Rule 35, F.R.A.P., nor this Court's Rule 20.4, contemplates that a suggestion for rehearing en banc, when not accompanied by a petition for rehearing, will affect the finality of a court of appeals judgment. See Rule 35(c). Accordingly, Petitioner's post-decision filing was ineffectual to toll the time for filing a petition for certiorari. Since no extenstion of time has been sought herein, the Petition should be dismissed as untimely.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied or dismissed.

Respectfully submitted,

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[8] Rule 35 explains that rehearing in banc "is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions. . ."

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3133

JOHN DEAN,

Plaintiff-Appellee,

v.

TRANS WORLD AIRLINES, INC., a Delaware Corporation; and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Defendant-Appellants.

APPELLEE'S MOTION FOR EN BANC REHEARING

COMES NOW the appellee, JOHN DEAN, by and through his attorney of record, L. S. EDMONDSON, and moves for the court for an en banc rehearing of this case.

An en banc rehearing is necessary because two decisions of this court, *Seay* v. *McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970) and *Seay* v. *McDonnell Douglas Corp.*, 553 F.2d 1126 (9th Cir. 1976), were not considered and were effectively overruled without discussion by the court's opinion.

Respectfully submitted,

/s/ L. S. EDMONDSON

L.S. Edmondson
Attorney for Appellee
1100 Puget Sound Bank Bldg.
Tacoma, Washington 98402

COPY
12/12/80 mh

15 March 1976

Air Lines Pilots Assoc.
1625 N.W. Ave. N.W.
W.D.C., 20036

Gentlemen:

Enclosed is my monthly dole as required by paragraph 3B of the agreement with TWA and ALPA.

I received your letter from John J. Magee dated 17 February 1976 in response to my letter of 22 January 1976 (misdated 22 December), but your attachment mentioned was not enclosed. I call to your attention that 3B(A) of the TWA-ALPA agreement calls for a service charge "for the administration of this agreement . ." to be payable on the 15th of each month and does not authorize any form of interest charge that I have objected to and refuse to pay. In addition 367 USC 740 (1961) IAM vs. Street and 373 US 113 (1963) BRC vs. Allen concluded that only charges to administer a contract could be forced upon honest citizenery [sic] by oppressive Labor Unions, and all other union activities, such as payments to other unions (such as the AFLOCIO), bribes, political contributions, mafia payoffs, etc., could not be charged. A recent decision in California enforces the point. Therefore, please reduce your billing procedure as soon as possible and charge me only for your legally allowed contractable items and refund to me immediately the overcharges for your illegal activities. Paragraph 3B(A) also clearly states the charge is a monthly charge and not a yearly one, so please revise your statement of account to reflect that fact and remove all extraneous gibberish.

Anti-fraternally yours,

/s/ JOHN L. DEAN

John L. Dean
326 E. 30th Street
Kansas City, Mo. 64108